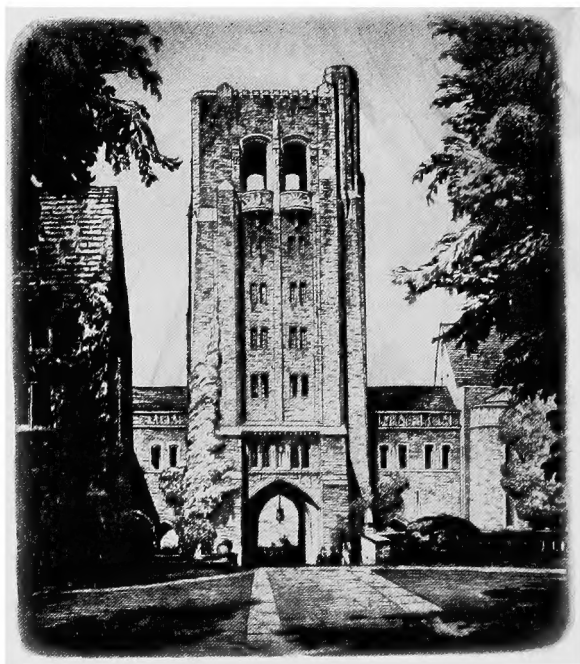




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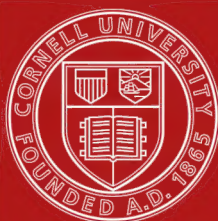


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THE  
LAW AND PRACTICE  
IN  
BANKRUPTCY

UNDER  
THE NATIONAL BANKRUPTCY ACT OF 1898,

BY  
WM. MILLER COLLIER

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*FOURTH EDITION*

BY  
WILLIAM H. HOTCHKISS

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FIFTH AND REVISED EDITION

With Amendments and Decisions to date

BY  
FRANK B. GILBERT

OF THE ALBANY BAR. EDITOR OF STREET RAILWAY REPORTS, ANNOTATED;  
JOINT AUTHOR OF COMMERCIAL PAPER, ETC.

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## PREFACE TO FIFTH EDITION.

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The fourth edition of this work was written and published soon after the enactment of the important amendments of 1903 to the bankruptcy act.

Many important cases have been decided and reported during the two years which have elapsed since the publication of the fourth edition, many of them bearing directly upon the effect of the amendments of 1903. These cases have been referred to in their appropriate connection in this new edition. The text of the former edition has been rewritten wherever necessary to conform it to subsequent authorities, and much new matter has been added supplementing and amplifying its many valuable features.

The progress and ever increasing volume of the law of bankruptcy is evidenced by the number of cases reported during the two years intervening between this and the prior edition of this work. These cases run through volumes 9, 10, 11, and 12, and the first number of volume 13 of the American Bankruptcy Reports. All of these cases have been referred to or discussed and considered in this edition of this work. The many valuable notes in these reports are frequently used or referred to.

The number and importance of these cases and their instructive value as interpretations of the amended bankruptcy act of 1903 and the policy adopted by the publishers to keep this work in advance of every other work upon the subject render imperative this new and revised edition.

FRANK B. GILBERT.

ALBANY, N. Y., *February 1, 1905.*



## PREFACE TO FOURTH EDITION.

---

The death of Mr. Eaton, the author of the third edition, made necessary the choice of a successor. Originally, the writer's purpose was merely to bring Mr. Eaton's edition down to date. The increasing importance of the federal bankruptcy system and the probability of important amendments, early caused the abandonment of that purpose, and the writing of the book anew. The result is a new work. The present author has, however, frequently drawn from his predecessors' conclusions, and gladly records his debt to them.

This rewriting has made possible some changes:

The cases referred to are cited in foot-notes, not in the body of the text, with, it is hoped, such completeness as to make the work a table of cases on the law of bankruptcy, as well as a text-book. The citations are largely to precedents under the present law, but those thought valuable under previous laws are also included. Reference is made, where possible, to both the American Bankruptcy Reports and the Federal Reporter, and, in the court of last resort, to the United States Reports.

Quotations from reported cases have been eliminated from the text.

Disputed points are not elaborately discussed, the work being intended for the practitioner who is perhaps unfamiliar with this branch of jurisprudence, rather than the student of or expert in it.

Through the "cross-references" at the head of each Section, all analogous provisions in the present law, as well as those in the former laws and the English Bankruptcy Acts of 1883 and 1890, are compacted into a few paragraphs, and the text and the statute thus webbed together. To a General Index, far more complete than in the earlier editions, has been added a system of short indices, called "Synopsis of Sections," at the head of each Section, by running which the investigator may



quickly reach the paragraph pertinent to his quest. The General Orders, Official Forms, and Supplementary Forms have also been carefully indexed.

Much more space has been given to practice than in the previous editions, and, for convenience of reference, all paragraphs bearing on it have been indexed by sections under "Practice" in the General Index. The General Orders have also been annotated and criticised and the Official Forms cross-referenced.

A long list of "Supplementary Forms," based on the experience of a referee in bankruptcy and the daily inquiries of the profession, has been added. These, while in no sense official, will, it is hoped, supply precedents for many of the papers needed in a bankruptcy proceeding. Where the Official Forms do not fit the law or the General Orders, new forms are offered as substitutes.

The abstracts of the exemption laws of the States, and the lists of the federal judges and clerks, and of the terms of court in the various districts, have been omitted.

The amendments of 1903 are indicated by italics, matter omitted from the original statute being placed in the foot-notes. The discussion of the amendments, themselves, is made as complete as possible — there being as yet no decisions construing them — and is based largely on the writer's knowledge of the purposes of the framers of the amendatory act and the genesis of the successive bills that resulted in that act.

The preparation of the work has stretched over more than a year, and it has been frequently revised to meet later decisions and changes in the then pending amendatory bill. For its errors in conclusion or statement, the writer asks the indulgence of all who recognize that to err is human. Such as it is, the work voices, doubtless imperfectly, the purpose of one who, recognizing that the bankruptcy system has now come to stay, earnestly desires to make its principles and procedure both clearer to the general practitioner and available even to the layman whose daily round is to give credit and collect his due.

The grateful acknowledgment of the writer is due to Washington A. Russell, Esq., of the Buffalo bar, for his preparation of the Table of Cases and his work in connection with the foot-notes; also to many of his brethren of the referees' courts for suggestions and encouragement.

Nor can the writer forbear to mention in this place the

work in behalf of the amendatory bill of The National Association of Credit Men, and especially its tireless and resourceful Secretary, William A. Prendergast, of New York. Without the earnest and early advocacy of the Ray bill by that Association, its passage would have been doubtful, if not impossible. Without immediate remedial legislation, the law itself would have been repealed. This record of appreciation by one who believes that a permanent bankruptcy system is necessary to a credit-giving nation is, therefore, gladly made.

WILLIAM H. HOTCHKISS.

BUFFALO, N. Y., *March* 16, 1903.





## PREFACE TO THIRD EDITION

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In his modest preface to the first edition of this book the author stated that his work was in the nature of a pioneer undertaking intended to "blaze the way" and aid in answering the questions which might arise before adjudications became plentiful. It is pleasant to know that Mr. Collier's scholarly and exhaustive book has not only assisted the practitioner to understand a complicated statute, the subject matter of which is new to most of the present generation, but has also helped greatly in the judicial construction and interpretation of that statute. It is gratifying, too, that the author's answers to many of the numerous questions which he foresaw would arise under this Act have proved to be correct.

In the two and a half years during which the Act has been in force and since the publication of the first edition of this book, most of the sections of the Act have been judicially construed. This fact alone makes a new edition at this time imperative. The bankruptcy decisions, under the law of 1898, have been collated in the present edition and their results set forth in rules of construction. The editor has quoted largely from the more important opinions because he believes that the bar will find it desirable to have the exact language of the court deciding the questions arising under the Act. It is not claimed that the book dispenses with the use of the reported cases but merely that this method guides the practitioner most surely and quickly to an intelligent knowledge of the effect of such decisions and where they may be found. All of Mr. Collier's work which has a permanent and historical value has been retained, while, at the same time, no effort has

been spared to make the revision complete and to make the book a thoroughly up-to-date treatise on the principles of the bankruptcy law and guide to bankruptcy practice.

With the hope that this purpose has been fairly realized, the editor submits his work to the kindly indulgence of his professional co-laborers.

JAMES W. EATON.

ALBANY, N. Y., November 17, 1900.

# PREFACE

TO THE

## ENLARGED EDITION.

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In presenting to the profession and to the public, an enlarged edition of my work on bankruptcy, it is but proper that the character and extent of the additions be explained. In this edition the forms which appeared in the original edition have been superseded by the official forms just promulgated by the Supreme Court; and the rules and orders in bankruptcy prescribed by the same court have been inserted. Not only is the full text of these rules and forms given, but an exhaustive index of them has been made, and they have been annotated and cross-referenced as far as their nature permits. The fact that by rule XXXVII it is provided that in proceedings in equity instituted for the purpose of carrying into effect the provisions of the bankruptcy act, or for enforcing the rights and remedies given by it, the rules of equity practice prescribed by the U. S. Supreme Court shall be followed, has led me to insert these rules; and a detailed index accompanies them.

A list of the judges of the U. S. District Courts and of the clerks thereof, and the addresses of the clerks, has been inserted for the convenience of attorneys.

The almost universal tendency on the part of practitioners, — in some cases enforced by local rulings of district courts —

to withhold proceedings in bankruptcy until the promulgation of the official rules, has resulted in an almost complete absence of adjudications under the new law. Consequently the enlarged edition contains, besides the additions above mentioned, no changes in the text of the original edition except the correction of a few typographical errors, and the changing of the abstract of the exemption laws of Louisiana to correspond with a new statute of that state recently passed and to go into effect upon January first, 1899. It is believed, however, that everything affecting the law and practice of bankruptcy is embodied in the book.

The marked favor shown to the work, — the original edition of which was exhausted on the day of issue and of which there have been already four reprints, — is a matter for which the author tenders his sincerest thanks. That the book, — now more full and complete than ever before and embracing, in one volume, the statute itself, the official rules, forms and orders, the exemption laws of all the states, the equity rules, exhaustive comment, and full citation of all authorities now applicable, — may be of further aid to the members of the profession and may assist them in the construction and application of the law and in practice under its provisions, is the wish of

THE AUTHOR.

AUBURN, N. Y., *November 29th*, 1898.

## PREFACE.

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The Law of Bankruptcy is purely statutory both in its origin and in its development. Underneath it lies the one great fundamental principle that when a person's property is insufficient to pay in full all of his creditors, it shall be equitably divided *pro rata* among them; but there is probably no other principle which can be said to be fixed and permanent and fundamental. Even in England, where there has been a continuous system of bankruptcy for over three hundred years, that system has been developed rather by parliamentary legislation than by judicial decision; while in the United States so infrequent and spasmodic has been the exercise by Congress of its constitutional powers upon the subject that we can hardly claim that bankruptcy is a part of our system of jurisprudence. It has been, in the past, rather in the nature of fragmentary statutory legislation, the various enactments on the subject being separated by intervals of decades, and each presenting important features not appearing in those preceding it, and often the later acts containing provisions which evidenced a different purpose and policy than those of the earlier acts. So entirely unstable and unfixed is bankruptcy as a system of law that under the last two statutes, as will be seen by reference to the notes under section 12 of the present work, the courts have very frequently been called upon to determine what is a bankruptcy law, and what the "subject of bankruptcy" includes. The successive statutes have affected different classes of persons, have materially changed the manner of procedure, have differed radically as to the acts to be regarded as acts of bankruptcy and have at times enlarged and at other times restricted the rights of creditors, or the benefits conferred and the duties imposed upon bankrupts. Not only have there been changes, but the changes

have not always tended toward any one end or indicated any fixed purpose. Like all laws of statutory creation the development of the American bankruptcy system has not been harmonious and symmetrical.

The study of bankruptcy, then, is a matter of statutory construction. The law must be considered and applied and enforced as it appears enacted, not as general notions of equity may seem to indicate as proper. The aim of the author of this book has been to study the bankruptcy act of 1898, to analyze its provisions and terms; in fine to ascertain the expressed will and intention of Congress. Following the general principle of the law of construction that each part of a statute or document is to be construed with reference to the whole, each section has been considered in connection with all others on the same or kindred topics, and copious cross-references have been given under the various sections.

But it is not to be denied that the present bankruptcy act, though presenting many points of dissimilarity, is substantially like that passed in 1867, and also bears many resemblances to those passed in 1800 and 1841. The fact has not been overlooked that the adjudicated cases decided under those acts not only shed light on the meaning of terms and provisions of the present act, but that in very many cases they are indisputably clear authorities. In so far as these cases are applicable we have cited them, and for every legal proposition unqualifiedly stated, judicial authority is given. Many of the cases cited are now analogous rather than decisive; but it is believed they sustain the points made. The reader will, of course, bear in mind that when a case is cited upon a given point, it is by us claimed to be applicable or analogous only as to that particular point. Upon other matters, by reason of differences between the present and former acts, it may be entirely inapplicable and incorrect as an exposition of the present law. While an attempt has been made to give all applicable decisions, we have also endeavored to omit all that would mislead and confuse. To show to what extent the cases may still be considered authorities, special pains have been taken to point out the differences between the statutes, and with this aim in view under each section we give the analogous provisions in all



the former acts, and as an appendix have inserted, for purposes of comparison, the full text of the act of 1867 with all amendments up to the time of its repeal.

While the authority of decided cases is cited for every legal proposition which is stated without qualification, we have felt that we would fail in properly performing the work undertaken if, because of the lack of adjudicated cases, no study should be given to and no comment made upon the great number of questions which spring up from the new and changed provisions of the act. In considering these we have not, however, always felt called upon to answer them dogmatically; but they have all been discussed and treated, and everything bearing upon them laid fully and fairly before the reader.

We take this opportunity of publicly extending our thanks to H. Noyes Greene, Esq., of the Troy, N. Y., bar, for assistance in preparing the index to this book and the table of cases; also to William H. Hotchkiss, Esq., of Buffalo, N. Y., referee in bankruptcy for Erie county, for his assistance in the preparation of the forms.

In presenting the work to the profession we do so with hesitancy. Of its shortcomings and failings few will be more keenly conscious than ourselves, but we ask that those who use it will bear in mind that the book is in the nature of a pioneer undertaking. It could without question be made more accurate, full and complete if its publication could be delayed until the courts should have construed the provisions of the statute and judicially answered all the questions that might arise, and if then it were made a mere digest of their decisions. But the demand of the bar is for a work that will to some extent, at least, aid them in the solution of the questions that will arise in the early months of practice under the act, before adjudications are plentiful. This task of "blazing the way" is here undertaken, and in proportion to the difficulty of the task we ask the leniency of the critic.

WM. MILLER COLLIER.

AUBURN, N. Y., *Sept.* 10, 1898.



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## EXPLANATION OF ABBREVIATIONS AND WORDS.

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- Am. B. R.**..... American Bankruptcy Reports (1899-1903).  
**Fed** ..... Federal Reporter (1880-1903).  
**Fed. Cas.** ..... Federal Cases (1796-1880).  
**N. B. N.**..... Vol. 1, National Bankruptcy News (1898-1899).  
**N. B. N. Rep.** ... Vols. 2 and 3, National Bankruptcy News and Reports (1899-1901).  
**N. B. R.**..... National Bankruptcy Register Reports (1867-1878).  
**U. S.**..... United States Reports (1790-1903).  
**Section** ..... When printed "Section", refers to one of the seventy-four Sections into which the book is divided, corresponding to the seventy-two sections of the law and the two supplementary sections;  
When printed "section", refers to the sections into which the law itself is divided.  
**Subsection**..... Refers to the subheads of the sections of the law indicated by italicized letters, a, b, c, etc.  
**Subdivision**..... Refers to the subheads of the subsections of the law, indicated by numerals in parentheses, (1), (2), (3), etc.

# THE LAW AND PRACTICE IN BANKRUPTCY.

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## SECTION ONE.

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### MEANING OF WORDS AND PHRASES.

§ 1. **Meaning of Words and Phrases.**—*a* The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "courts" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act;

(13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars

per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

**Analogous provisions:** In U. S.: Act of 1867, § 48; R. S., § 5013.

In Eng.: Act of 1883, § 168.

**Cross references:** **To the law:** *As to* (1), § 67-c; *As to* (2), §§ 18-e-g, 38-a (1); *As to* (3), §§ 24, 25; *As to* (4), generally to the whole law; *As to* (5), §§ 51, 71; *As to* (6), §§ 3-a (4); *As to* (7), § 39-a, and generally; *As to* (8), § 2; *As to* (9), §§ 55, 56, 57, 58, 59, 60; *As to* (11), §§ 17, 63, and generally; *As to* (12), §§ 14, 15, 17, 29; *As to* (13), §§ 21, 39, 47; *As to* (15), §§ 3, 60, 67; *As to* (18), §§ 2 (3), 33, 51; *As to* (19), §§ 2 (1), 3-a, 4; *As to* (20), §§ 18-a, 59-a-b; *As to* (21), §§ 33-43, 72, and generally; *As to* (22), §§ 3-a (1), 14-b (2) (4), 29-b; *As to* (23), §§ 56-b, 57-e-h; *As to* (24), §§ 6, 23, 70-e; *As to* (25), §§ 3-a-b, 14-b (4), 57-g, 60-a-b, 67-e, 70-a-e; *As to* (26), §§ 44-50, 72, and generally; *As to* (27), §§ 4-b, 64-b (4).

**To the General Orders:** See this title under the several Sections, *post*.

**To the Forms:** See same.

## SYNOPSIS OF SECTION.

### I. Definitions in General.

Nomenclature of Bankruptcy.

### II. Important Statutory Definitions.

Subd. (15). "Insolvency."

Subd. (22). "Conceal."

Subd. (23). "Secured Creditor."

Subd. (25). "Transfer."

Subd. (27). "Wage-earner."

### III. Judicial Definitions.

"Preference."

"Dividends."

"Property."

## I. DEFINITIONS IN GENERAL.

**Nomenclature of Bankruptcy.**—The law of 1867 contained no definitions. Section 48 explained that "person" included "corpo-

ration" and "oath" included "affirmation," indicated that the singular included the plural, and the like. Following the present English Act,<sup>1</sup> however, the law of 1898 defines the meaning of many words. Several are important. They largely determine the scope of the act. In some instances, the definitions indicate wide departures from the ordinary meanings of the words. The practitioner should familiarize himself with this, the peculiar nomenclature of bankruptcy, at the outset. Some of the more important definitions are considered briefly below.

## II. IMPORTANT STATUTORY DEFINITIONS.

**Subd. (15). "Insolvency."**—In all foreign bankruptcy laws, cessation of payments is the essential of insolvency.<sup>2</sup> Until the passage of the present law, it was the test in the United States. Thus, it was held that "the amount of the trader's property was of no consequence, if he was unable to pay his debts in lawful money as they matured."<sup>3</sup> Under the law of 1898, the value of that property is the essential element. Insolvency turns on what is a "fair valuation."<sup>4</sup> This has been held to be the present market value, and not the amount which he might realize from a forced sale of his property.<sup>5</sup> Where the act of bankruptcy itself depreciates the debtor's property until, under this definition, he is insolvent, the petition against the alleged bankrupt must be dismissed.<sup>6</sup> Manifestly, a person may not be able to meet current obligations, and yet his property at a fair valuation may be sufficient to pay his debts.<sup>6a</sup> The definition of insolvency contained in this section has been much criticised. It is undoubtedly humane, but is thought to put creditors

1. Act of 1883, § 168.

2. For the universality of this test, see "Bankruptcy, A Study of Comparative Legislation," by S. Whitney Dunscomb, pp. 12-14.

3. *Ex parte Hull*, Fed. Cas. 6,856; *In re Dibblee*, Fed. Cas. 3,884; *In re Wells*, Fed. Cas. 17,388; *Morgan v. Mastick*, Fed. Cas. 9,803.

4. *In re Gilbert*, 8 Am. B. R. 101, 112 Fed. 951.

5. *Duncan v. Landis*, 5 Am. B. R. 649, 106 Fed. 839.

6. *Chicago Title & Trust Co. v. Roebling's Sons*, 5 Am. B. R. 368,

107 Fed. 71. The following cases will also be found instructive: *In re Rome Planing Mills*, 3 Am. B. R. 766, 99 Fed. 937; *In re Rogers Milling Co.*, 4 Am. B. R. 540, 102 Fed. 687; *Vaccaro v. Bank*, 4 Am. B. R. 474, 103 Fed. 436; *Lansing Boiler Works v. Ryerson & Son*, 11 Am. B. R. 558 (C. C. A.), 128 Fed. 701.

6a. *Hackney v. Raymond Bros., etc., Co.* (Neb.), 10 Am. B. R. 213. See also *In re Doscher*, 9 Am. B. R. 547, 556, 120 Fed. 408; *In re Codrington*, 9 Am. B. R. 243, 126 Fed. 891.

at their debtor's mercy. On the other hand, it protects the debtor whose property is not quickly convertible. In this aspect, it results in conditions not unlike those of a debtor who has taken advantage of the suspended payment periods sanctioned by some of the continental bankruptcy systems. In actual practice, it has done little harm.<sup>7</sup> The Ray amendatory bill of 1902 sought to insert words which would have excluded exempt property from the aggregate of a debtor's assets in determining whether he was insolvent, but the Senate, unfortunately, struck out the provision. Exempt property should, therefore, be included as well as that not exempt.<sup>8</sup> Where property is transferred in fraud of creditors, the statute contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is insolvent. Where property is transferred in payment of, or as security for a just debt, the mere fact that it may involve a preference in bankruptcy should bankruptcy proceedings be instituted, does not exclude it from consideration in determining the debtor's solvency.<sup>8a</sup>

**Subd. (22). "Conceal."**—This, under the present law, means more than "hide;" it connotes more than "secrete." Thus, with peculiar reference to the second objection to a discharge,<sup>9</sup> it includes the falsifying or mutilating of books or business records. Under the former law, concealment of property included a concealment of title to property.<sup>10</sup> The new definition strengthens rather than impairs this doctrine. It may be doubted, however, whether the definition adds anything to the ordinary meaning of the word "concealed" in § 29-b; the difficulty of reading in either "falsified" or "mutilated" will be apparent at a glance. Almost as difficult would be the interpolation of these new meanings into the first act of bankruptcy.<sup>11</sup> This definition has not yet been interpreted by the courts.

**Subd. (23). "Secured Creditor."**—In bankruptcy, a creditor, to be secured, must either (a) hold security against the property of

7. See further, under Section Three. See also discussion upon what constitutes insolvency by Referee Hotchkiss in *Matter of Rung Furniture Co.*, 10 Am. B. R. 44.

8. Note in *re Baumann*, 3 Am. B. R. 196, 96 Fed. 946.

8a. In *re Doscher*, 9 Am. B. R. 547, 554, 120 Fed. 408, holding also

that this clause refers to the act of bankruptcy stated in § 3-a (1), and not to the acts of bankruptcy relating to preferences.

9. See § 14-b (2).

10. In *re Williams*, Fed. Cas. 17,703.

11. See § 3-a (1).

the bankrupt, or (b) be secured by the individual obligation of another who holds such a security. This definition thus restricts the popular meaning.<sup>12</sup> It becomes important in questions arising on the allowance of secured claims under § 57-e-g-i. The English definition, "a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, for a debt due to him from the debtor,"<sup>13</sup> is even more restrictive than is ours. Thus, in both systems, creditors may often be secured and yet not be secured creditors. The homestead of a bankrupt passes to his trustee, and is "assignable under this act," and the holder of a mortgage thereon is a secured creditor.<sup>13a</sup>

**Subd. (25). "Transfer."**—This word has a most comprehensive meaning in the bankruptcy law. It includes every method of disposing of or parting with property or its possession; thus doubtless comprising within itself even the idea commonly expressed by "conceal." Its enlarged meaning has already been extensively discussed by the courts. A payment of money, even in due course of business, is a transfer;<sup>14</sup> but the performance of labor is not.<sup>15</sup> In § 67-e, "transfer" seems to be used as something different from "conveyance," "assignment" and "incumbrance," though the better opinion is that this was an inadvertence in the drafting of the law, and that even here the generic word includes those that are specific. The words "as a payment, pledge, mortgage, gift, or security," as used in this subdivision are to be taken as illustrative only and not qualifying.<sup>15a</sup> Transfer includes a chattel mortgage.<sup>15b</sup> This definition becomes important in §§ 3-a (1) (2) and b (1), 60-a, 67-e, three of the leading sections of the law. It occurs in some of

12. In re Coe, 1 Am. B. R. 275.

13. Act of 1883, § 168.

13a. Fenley v. Poor, 10 Am. B. R. 377, 121 Fed. 739.

14. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 5 Am. B. R. 814, affirming many cases in the lower courts to the same effect, in which case the court said: "'Transfer' is defined to be not only the sale of property, but every other and different mode of disposing of or parting with property. All technicality and narrowness of meaning is precluded, the word is used in its most comprehensive sense, and is intended to include every means and manner by

which property can pass from the ownership and possession of another and by which the result forbidden by the statute may be accomplished,—'a preference enabling a creditor to obtain a greater percentage of his debt than any other creditor of the same class.'"

15. In re Steers Lumber Co., 6 Am. B. R. 315, 110 Fed. 738; affirmed s. c., 7 Am. B. R. 332, 112 Fed. 406; In re Doscher, 9 Am. B. R. 547, 120 Fed. 408.

15a. In re Stege, 8 Am. B. R. 515, 116 Fed. 342, 54 C. C. A. 116.

15b. Matter of Riggs Restaurant Co., 11 Am. B. R. 508, 130 Fed. 691.



§ 1.]

"Wage-earner," "Preference."

the sections as amended by the act of 1903.<sup>16</sup> Its significance to a proper understanding of the statute cannot be too much emphasized.

**Subd. (27). "Wage-earner."**—Cases interpreting this definition are already numerous. A traveling salesman is not, it seems, a wage-earner;<sup>17</sup> yet, under the meaning of the word, as used in local statutes, may be.<sup>18</sup> A bookkeeper working for a stated salary when the act of bankruptcy was committed is a wage-earner.<sup>18a</sup> The definition resolves itself into what constitutes working for salary or hire, and, in the end, to the rulings of the state courts on analogous provisions in state laws. The importance of the definition is found in the fact that wage-earners cannot be petitioned against,<sup>19</sup> and are entitled to priority of payment for a limited period of labor prior to the bankruptcy,<sup>20</sup> the phrase "workmen, clerks, and servants," meaning substantially the same thing.

### III. JUDICIAL DEFINITIONS.

**"Preference."**—Though this word is not defined in this section, the Supreme Court has held that § 60-a is a definition.<sup>21</sup> A preference under this law has then but three elements: (a) insolvency, (b) the procuring or suffering of a judgment or the making of a transfer by the bankrupt, (c) a consequent inequality between creditors of the same class. Since the amendatory act of 1903, such a preference ceases to be so if four months shall elapse before the bankruptcy proceeding begins.<sup>22</sup> A voidable preference is something very different.<sup>23</sup> It follows, also, that only transfers and judgments can be preferences. The English law continues to distinguish between mere preferences and those that are either "fraudulent" <sup>24</sup> or "undue." The result of our new meaning to an old-time word has been far-reaching.<sup>25</sup>

16. See, for instance, §§ 57-g, 60-a.

17. In re Scanlon, 3 Am. B. R. 202, 97 Fed. 26; In re Greenewald, 3 Am. B. R. 696, 99 Fed. 705.

18. In re Lawlor, 6 Am. B. R. 184, 110 Fed. 135.

18a. In re Pilger, 9 Am. B. R. 244, 118 Fed. 206.

19. § 4-b.

20. § 64-b (4).

21. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 5 Am. B. R. 814, where it is said:

"Subdivisions *a* and *b* are concerned with a preference given by a

debtor to his creditor. Subdivision *a* defines what shall constitute it, and subdivision *b* states a consequence of it" (p. 446).

To same effect, In re Rosenberg, 7 Am. B. R. 316; Swartz v. Bank, 8 Am. B. R. 673, 117 Fed. 1. Compare, however, Stern v. Louisville Trust Co., 7 Am. B. R. 305, 112 Fed. 501.

22. See Section Sixty of this work.

23. See § 60-b.

24. Act of 1883, § 48.

25. Compare Pirie v. Chicago Title & Trust Co., ante, with In re Hall, 4 Am. B. R. 671, 679; and note

"**Dividends.**"—Prior to the amendments of 1903, the meaning of "dividends" was important as a basis for compensation of trustees and referees under §§ 40-a and 48-a. The term has been defined as "a parcel of the fund arising from the assets of the estate, rightfully allotted to a creditor entitled to share in the fund, whether in the same proportion with other creditors or in a different proportion."<sup>26</sup> It may be doubted whether this is correct, since, under § 65-a, dividends can only be paid on claims which are neither secured nor entitled to priority.<sup>27</sup> It may also be doubted whether § 65-a amounts to a definition at all.<sup>28</sup> The meaning of this word is, however, now unimportant.<sup>29</sup>

"**Property.**"—The English Act of 1883 defines property as including "money, goods, things in action, land and every description of property, whether real or personal and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest or profit, present or future, vested or contingent, arising out of or incident to property as defined above."<sup>30</sup> This definition is comprehensive. Section 70-a of our law indicates, in words which are at times oddly narrow and again surprisingly broad, what property passes to the trustee. Otherwise, the law contains no definition of "property."

changes due to amendments of 1903, under Section Sixty, post.

<sup>26.</sup> *In re Barber*, 3 Am. B. R. 306, 311, 97 Fed. 547.

<sup>27.</sup> *In re Utt*, 5 Am. B. R. 383, 105 Fed. 754.

<sup>28.</sup> Thus compare *In re Gerson*, 2

Am. B. R. 352, with *In re Sabine*, 1 Am. B. R. 322, and *In re Barber*, supra.

<sup>29.</sup> Commissions are now paid on "moneys disbursed." §§ 40-a and 48-a.

<sup>30.</sup> § 168.

## SECTION TWO.

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### CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

§ 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, *and allow such officers additional compensation for such services, but not at a*

*greater rate than in this Act allowed trustees for similar services;\** (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

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**Analogous provisions: In U. S.:** Act of 1867, §§ 1, 11, 49, and R. S., §§ 563, 711, 4972, 4973, 4974, 4975, 4977, 4978, 4978-A, 4978-B, 4979, 5014; Act of 1841, §§ 6, 16; Act of 1800, § 2.

**In Eng:** Act of 1883, §§ 92, 93, 94, 95, 99, 100, 102.

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\*Amendments of 1903 in italics.

§ 2.]

Cross-references; Synopsis.

**Cross references: To the law:** *As to* (1), §§ 1 (8), 18, 38-a (1); *As to* (2), § 57; *As to* (3), §§ 2 (15), 3-e, 69-a; *As to* (4), § 29; *As to* (5), §§ 2 (3) (15), 48, 72; *As to* (6), §§ 23, 58-a (7), 59; *As to* (7), §§ 2, 15; *As to* (13), § 2 (15) (16), and generally; *As to* (14), § 10; *As to* (10), § 39-a (5); *As to* (11), §§ 6, 7 (8), 47-a (11); *As to* (12), §§ 14, 15; *As to* (13), § 2 (15) (16), and generally; *As to* (14), § 10; *As to* (15), §§ 11, 21-a, and generally; *As to* (16), § 41; *As to* (17), §§ 44, 46; *As to* (18), §§ 3-e, 62, 64-b (3); *As to* (19), § 32.

**To the General Orders:** See this title under the several Sections.

**To the Forms:** See same.

## SYNOPSIS OF SECTION.

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**Subd. (17).** To Appoint Trustees.

**Subd. (18).** To Tax Costs.

**Subd. (19).** To Transfer Cases.

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**I. JURISDICTION IN GENERAL.**

**What are Courts of Bankruptcy.**—As in England, where in the London district the High Court, and elsewhere the County Courts, have jurisdiction in bankruptcy, our law avails itself of an existing organization and confers bankruptcy jurisdiction on the district courts in the States and Territories, and the corresponding courts in the Districts of Columbia and Alaska.<sup>1</sup> The English Court of Bankruptcy in the London District is in effect a separate court, devoted exclusively to bankruptcy matters, and appeals are uniformly heard by the same judge of the Court of Appeal.<sup>2</sup> This is not so in this country. It would seem, however, that, under our system, the district courts while sitting in bankruptcy are also separate courts, exercising a distinct jurisdiction, different from that, for instance, of the same courts while sitting in admiralty;<sup>3</sup> but that the distinction is one of practice, rather than by statute. A bankruptcy court is a court of equity, seeking to administer the law according to its spirit, and not merely by its letter.<sup>3a</sup>

1. See § 1 (8).

2. See "Analogous Provisions," ante.

3. In re Norris, Fed. Cas. 10,304.

3a. In re Kane (C. C. A.), 11 Am. B. R. 533, 127 Fed. 552. The words "at law" as used in the first sentence conferring on courts of

**Jurisdiction is Statutory.**—As courts of bankruptcy, their origin is statutory, and they have no powers or jurisdiction other than is conferred on them by or necessarily implied from the statute.<sup>4</sup> But such courts are not inferior courts in the sense that essential jurisdictional facts must affirmatively appear upon the record.<sup>5</sup> By the first clause of this section, their jurisdiction is limited to "proceedings in bankruptcy," *i. e.*, bankruptcy proceedings *per se*, as distinguished from civil actions at law or plenary suits in equity.<sup>6</sup> Thus, these courts have exclusive jurisdiction to adjudicate bankrupts,<sup>7</sup> and, after adjudication, to administer their estates.<sup>8</sup> This jurisdiction cannot be conferred by consent, if of the subject-matter,<sup>9</sup> but can if of the person only.<sup>10</sup>

**Jurisdiction of Suits to Recover Property.**—The animated controversy as to the proper forum for proceedings to recover property brought by the trustee was, in May, 1900, settled by the Supreme Court in *Bardes v. Bank*.<sup>11</sup> This case is no longer controlling, § 23-b, together with the corresponding changes in §§ 60-b, 67-e, and 70-e,<sup>12</sup> having been amended to meet the reasoning of the Supreme Court. The broad and elastic phrasing of subdivisions (7) and (15) is, therefore, no longer limited by § 23-b. Indeed, it may be taken as settled that courts of bankruptcy as such have, within their respective territorial limits, ample, though, of course,

bankruptcy "such jurisdiction, *at law* and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings," may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity. *Bardes v. Bank*, 4 Am. B. R. 163, 173, 178 U. S. 524.

4. In re Elmira Steel Co., 5 Am. B. R. 484, 109 Fed. 456; *Jobbins v. Montague*, Fed. Cas. 7,330; In re Williams, 9 Am. B. R. 741, 120 Fed. 38.

5. In re Columbia Real Estate Co., 4 Am. B. R. 411, 101 Fed. 965; *Hays v. Ford*, 55 Ind. 52; *Bryant v. Kinyon*, (Mich.) 6 Am. B. R. 237, 86 N. W. 531, 53 L. R. A. 871; In re Elmira Steel Co., 5 Am. B. R. 484, 109 Fed. 486.

6. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163. Compare also discussion under Section Twenty-three.

7. In re Gutwillig, 1 Am. B. R. 78, 90 Fed. 475; In re Sievers, 1 Am. B. R. 117, 91 Fed. 366.

8. *Carpenter v. O'Connor*, 1 Am. B. R. 381.

9. *Jobbins v. Montague*, supra.

10. *Hall v. Kincell*, 102 Fed. 301. Compare also In re Mason, 3 Am. B. R. 599, 99 Fed. 256; In re Smith, 9 Am. B. R. 98, 117 Fed. 961.

11. See foot-note 6, supra.

12. For some confusion growing out of the Senate's change in the House amendment of § 23-b and failure to make a corresponding change in § 70-e, see those sections, post.

as to suits, not exclusive, jurisdiction to do everything "which may be necessary for the enforcement of the provisions of the act."<sup>13</sup>

**Courts always Open.**— Courts of bankruptcy are always open for the transaction of business.<sup>14</sup> In most of the districts, bankruptcy matters are heard on certain days; this, for the convenience of the courts. Orders made in chambers in vacation are as effective as when made at a term or on a rule day.

**Territorial Extent of Jurisdiction.**— The Act of 1867 limited the jurisdiction of courts of bankruptcy to "their respective districts." This has been held to mean that the exercise of those powers was limited to those districts.<sup>15</sup> Thus, a subpoena in bankruptcy is not effective beyond the territorial limits of the court issuing it,<sup>16</sup> unless the residence of the person subpoenaed be less than one hundred miles away.<sup>17</sup> In States having several districts, this rule, in spite of the proviso clause of § 41-a, shortens the reach of the district courts and may make their process less effective than that of the state courts. Where process to seize the bankrupt's property is necessary, ancillary proceedings in the proper district may be had.<sup>18</sup> Where testi-

13. For the general question of jurisdiction prior to the amendatory act of 1903, see *Bardes v. Bank*, supra. See also discussion in Section Twenty-three of this work.

14. In *re Ives*, 7 Am. B. R. 692, 113 Fed. 911, affirming s. c., 6 Am. B. R. 653, 111 Fed. 495; In *re Henschel*, 8 Am. B. R. 201.

For jurisdiction of referee courts, see *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, and discussion in Sections Thirty-eight and Thirty-nine.

For jurisdiction to stay suits in other courts, see Section Eleven.

For effect of law on state insolvency and general assignment laws, see discussion in "Supplementary Section to Original Act," post.

For special powers of bankruptcy courts, see in this section, post, and note in *re Christy*, 3 How. 292.

15. Consult *Lathrop v. Drake*, 91 U. S. 516, though the same is not exactly in point.

16. *Paine v. Caldwell*, Fed. Cas. 10,674. Compare also In *re Hemstreet*, 8 Am. B. R. 760, 117 Fed. 568.

17. See R. S., § 876, and under Section Forty-one; also In *re Hemstreet*, supra. See also In *re Appel*, 4 Am. B. R. 722, 103 Fed. 931, holding that, though served outside the district, it operates in rem within it.

18. In *re Peiser*, 7 Am. B. R. 690, 115 Fed. 199; In *re Westfall Bros.*, 8 Am. B. R. 431; In *re Tift*, Fed. Cas. 14,034; *Shainwold v. Lewis*, 5 Fed. 510. But in *re Williams*, 9 Am. B. R. 741, 120 Fed. 38, the court was of the opinion that the Bankruptcy Act makes no provisions for ancillary or auxiliary proceedings in district courts other than that in which the proceedings are pending, and a petition for an injunction to protect the assets of a bankrupt, where the proceedings were pending in another district, was denied. This opinion met the approval of the court in the case of *In re Williams*, 10 Am. B. R. 538, 120 Fed. 321. This question was fully discussed by Judge Hammond in *Ross-Meeham Foundry Co. v. Car & Foundry Co.*, 10 Am. B. R. 624, 124 Fed. 403, where the conclusion was reached that the "necessity for



mony only is wanted, it may be obtained by the customary method of deposition.<sup>19</sup> There is no doubt that title passes to the trustee as of the date of the adjudication, no matter where the property may be situated;<sup>20</sup> it is equally certain that the district courts of other districts have jurisdiction to consider suits to recover possession of the bankrupt's property situated therein and by him fraudulently or preferentially transferred.<sup>21</sup> However, no cases under the present law yet decided have reaffirmed these doctrines.

## II. SPECIAL POWERS.

**Subd. (1). To Adjudicate Bankrupts.**—Under the previous law, domicile and residence were often held equivalent terms. The confusion resulting from the conflicting decisions under that act have been set at rest by subdivision (1). Now, a debtor who has had (a) his principal place of business, (b) resided or (c) had his domicile, for the greater portion of the previous six months, within the territorial limits of the court to which the application is made, may be by that court adjudicated a bankrupt. The fact that the alleged bankrupt is a roving character, never residing at any place for the required period of time, does not affect the necessity of proving that such bankrupt had resided for the greater portion of the previous six months within the territorial limits of the court.<sup>21a</sup>

*As Affected by Domicile.*—Domicile is a question of intent and fact.<sup>22</sup> A debtor who absconds does not lose his domicile within the meaning of the act.<sup>23</sup> The burden of showing change of domicile is on him who asserts it.<sup>24</sup> Illustrative cases will be found in the foot-note.<sup>25</sup>

separate administrations and ancillary proceedings should not exist under any well-regulated system of bankruptcy. The design of the statute is to avoid all ancillary proceedings and secure one uniform possession of the estate by a single court of bankruptcy, having the jurisdiction to administer the assets everywhere under that statute."

19. See § 21-b-c. See also *In re Hemstreet*, supra, and *In re Westfall Bros.*, supra.

20. Compare under Section Seventy.

21. That is, since the amendatory act of 1903. See also *Goodall v.*

*Tuttle*, Fed. Cas. 5,533, and *Lathrop v. Drake*, ante.

21a. *In re R. H. Williams*, 9 Am. B. R. 736, 120 Fed. 34.

22. *In re Williams*, 3 Am. B. R. 677, 99 Fed. 544; *In re Berner*, 3 Am. B. R. 325; *In re Grimes*, 2 Am. B. R. 160, 96 Fed. 529; *In re Dinglehoeft*, 6 Am. B. R. 242, 109 Fed. 866.

23. *In re Filer*, 5 Am. B. R. 332, 108 Fed. 209.

24. *In re Berner*, 3 Am. B. R. 325. Compare *In re Scott*, 7 Am. B. R. 39, 111 Fed. 144.

25. *In re Grimes*, 2 Am. B. R. 160, 96 Fed. 529; *In re Clisdell*, 2 Am. B. R. 424; *In re Blair*, 3 Am. B. R. 588, 99 Fed. 76.

*Principal Place of Business.*—Principal place of business is more exact than “carried on business,” the words used in the former act. If a debtor is not a resident, he may be adjudged bankrupt in a district where he has his principal place of business.<sup>26</sup> If the debtor is a corporation organized under the laws of or with home office in another State, it may be adjudged in the district where its assets and manufacturing plant are;<sup>27</sup> and this in spite of the fact that its sales and executive offices may be in another district.<sup>28</sup>

*Residence.*—Residence may mean no more than “sojourning.” It indicates permanency of occupation as distinguished from temporary occupation, but does not include so much as “domicile,” which requires an intention continued with residence.<sup>28a</sup> The word “resided” is of little importance in the present law. Cases may arise where it may be useful, as when a debtor attempts to escape bankruptcy by denying domicile. The cases cited in the previous paragraphs will then be valuable.<sup>29</sup>

*Six Months.*—Six months or the greater portion thereof does not mean that the debtor shall have been domiciled or had his principal place of business in the district for six months before the petition is filed,<sup>30</sup> but only for the greater part of such period.<sup>31</sup>

*Alien Bankrupts.*—An alien may be adjudged bankrupt, provided he has property within the United States, or, if he has been adjudged bankrupt in the bankruptcy courts of another country and does not reside but has property within the United States.<sup>32</sup>

*Removal from One District to Another.*—The removal of a person from one district to another for the purpose of pretending to acquire a residence so that a petition in bankruptcy might be filed by him in a district in which he did not reside, with the intention of leaving the place as soon as his discharge was granted, does not make him a resident of the district, and such facts being disclosed

<sup>26</sup>. In re Brice, 2 Am. B. R. 197, 93 Fed. 942.

<sup>27</sup>. Dressel v. North State Lumber Co., 5 Am. B. R. 744, 107 Fed. 255; In re Magid-Hope Silk Mfg. Co., 6 Am. B. R. 610, 110 Fed. 352.

<sup>28</sup>. In re Elmira Steel Co., ante. For peculiar cases in point, see In re Marine Machine, etc., Co., 1 Am. B. R. 421, 91 Fed. 630; In re Plotke, 5 Am. B. R. 171, 104 Fed. 964; In re Mackey, 6 Am. B. R. 577, 110 Fed. 355.

<sup>28a</sup>. In re Garneau (C. C. A.), 11

Am. B. R. 679, 127 Fed. 677 (citing Tracy v. Tracy, 62 N. J. Eq. 807, 48 Atl. 533; Shaeffer v. Gilbert, 73 Md. 66, 20 Atl. 434).

<sup>29</sup>. Compare also In re Watson, Fed. Cas. 17,272; In re Waxelbaum, 3 Am. B. R. 267, 97 Fed. 562.

<sup>30</sup>. In re Ray, 2 Am. B. R. 158. Contra, In re Stokes, 1 Am. B. R. 35.

<sup>31</sup>. In re Plotke, 5 Am. B. R. 171, 104 Fed. 964; Matter of Harris, 11 Am. B. R. 649.

<sup>32</sup>. Compare discussion under Section Four.

upon his examination, his creditors may have the proceedings dismissed for want of jurisdiction, the adjudication in bankruptcy not being conclusive upon them.<sup>32a</sup>

*Effect of Adjudication, in Rem.*—An adjudication acts both *in personam* and *in rem*. The property of the bankrupt at once vests in the trustee subsequently to be appointed, remaining meanwhile *in custodia legis*. In this the law is defective, and the resultant difficulties and dangers are not fully met by § 2 (3) authorizing the appointment of receivers. In the absence of an official with powers and functions similar to those of the official receiver in England,<sup>33</sup> the custody of the court in the interregnum between the filing of the petition and the appointment and qualification of the trustee is often more theoretical than actual. The practice has grown up in some districts of appointing receivers in all cases; this rests on doubtful authority, because not always “absolutely necessary for the preservation of estates,” is expensive and sometimes proves an interference with the right given the creditors to choose their trustee. In other districts, the attorney in charge is held responsible for the property. In still others, the property is in effect put under the seal of the court by being locked up and the keys delivered to the referee. While the rules of the Western District of Michigan establish the strange practice of making the referee to whom the case has been referred and who is, therefore, “the court” as well, *eo nomine* the receiver in every voluntary case. Of the four, the first is the safer method. By it alone can a bankrupt’s property be surely safeguarded from theft and the elements until its rightful owner, the trustee, takes charge.<sup>34</sup>

Subd. (2). “To Allow and Reconsider Claims.”—This jurisdiction is fully discussed under § 57.

Subds. (3) (5) (15). “To Appoint a Receiver and Continue a Going Business.”—The appointment of receivers may be made under § 2 (3) or under the equity powers of the court operating through § 2 (15); if under the former, they are merely custodians, if under the latter, they have such powers as the court gives them. These doctrines have, however, been challenged.<sup>35</sup> The power to appoint a receiver should be invoked with caution, and only when

<sup>32a</sup>. In re Garneau (C. C. A.), 11 Am. B. R. 679, 127 Fed. 677.

<sup>33</sup>. Act of 1883, §§ 66-71.

<sup>34</sup>. See also the next paragraph but one, et seq.

<sup>35</sup>. Compare In re Fixen, 2 Am.

absolutely necessary to preserve assets.<sup>36</sup> It seems that if appointed in an involuntary case, before adjudication, a receiver must give a bond.<sup>37</sup>

*Powers of Receiver.*—The powers of the receiver depend on the order of appointment. If in the words of § 2 (3), he becomes a mere custodian. When so appointed, the court may confer additional powers on him, and, for cause, order a sale;<sup>38</sup> but, if before an adjudication, only of perishable property.<sup>39</sup> Indeed, it may be doubted whether a receiver has a title that can be transferred, the title of the trustee when appointed going back by relation to the filing of the petition.<sup>40</sup> This is a difficulty of little moment; for, if vested with power to order a sale, the court has power to order the trustee, when appointed, to ratify such sale. It has also been held that a receiver before adjudication should not be permitted to bring suit beyond the territorial jurisdiction of the court that appointed him;<sup>41</sup> but, it seems, he can within it.<sup>42</sup>

*Effect of Bryan v. Bernheimer.*—In the interim between the Supreme Court's decisions in *Bardes v. Bank*, *supra*, and *Bryan v. Bernheimer*,<sup>43</sup> it was generally conceded that receivers had not power to take possession of property claimed adversely, even if to act only as custodians. Since the latter case, however, the lower courts have been confirmed in their earlier opinions that the district court had power to direct receivers or the marshals to seize and hold the property of the bankrupt wherever found; this is something very different from a summary settlement of a controversy as to the title of property so seized, which must usually be by plenary suit.<sup>44</sup> But, though such jurisdiction exists, it will rarely be exercised.<sup>45</sup> An injunction, either in the proceeding<sup>46</sup> or in an ancillary

B. R. 822, 96 Fed. 748, and *In re Florcken*, 5 Am. B. R. 802, 107 Fed. 241, with *Boonville v. Blakey*, 6 Am. B. R. 13, 107 Fed. 891.

36. *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623; *In re Florcken*, *supra*.

37. § 3-e.

38. *In re Becker*, 3 Am. B. R. 412, 98 Fed. 407. See also cases cited under foot-note 36, *supra*.

39. *In re Kelly Dry Goods Co.*, 4 Am. B. R. 528, 102 Fed. 747.

40. § 70-a.

41. *In re Schrom*, 3 Am. B. R. 352, 97 Fed. 760; *In re National Merc.*

*Agency*, 12 Am. B. R. 189, 128 Fed. 639.

42. See *In re Fixen*, *supra*, and compare *Boonville Nat. Bank v. Blakey*, *supra*.

43. 181 U. S. 188, 5 Am. B. R. 623.

44. *In re Etheridge Furniture Co.*, 1 Am. B. R. 112, 92 Fed. 329; *In re Young*, 7 Am. B. R. 14, 111 Fed. 158; *In re Tune*, 8 Am. B. R. 285, 115 Fed. 906. See also "Punishment for Contempt," *post*.

45. Compare "Effect on Auxiliary Remedies," in Section Twenty-three of this work.

46. See "Injunctions other than against Suits," in this Section, *post*.

action in equity to prevent the adverse claimant from disposing of the property,<sup>47</sup> will usually be enough. Nor should courts of bankruptcy, through their receivers, seize property claimed adversely and already in the custody of a state court; comity requires that the first court obtaining jurisdiction shall retain it until ousted by its consent.<sup>48</sup> Thus, though there is ample jurisdiction to take possession of such property, the trustee should always apply to the state court in the first instance.<sup>49</sup> Where a receiver, acting under an erroneous order, takes property from one claiming to be the owner, without his consent, the property should be returned to him, without charge of any kind.<sup>49a</sup>

*Compensation of Receiver.*—The compensation of receivers was not limited by the original statute, but rested on the sound discretion of the court.<sup>50</sup> The policy of the law has been to reduce expenses of administration to a minimum. This policy seems to be but slightly modified by the amendatory act of 1903.<sup>51</sup> The words added to subdivision (5) by the Senate amendments of the Ray bill, "but not at a greater rate than in this act allowed trustees for similar services," are, however, clearly a limitation on discretion. They apply, however, only to compensation allowed for continuing a going business. Hereafter, in such cases, these officers cannot receive allowances larger than the percentages fixed by § 48-a on moneys disbursed,<sup>52</sup> but where they have carried on the business of the bankrupt with

47. As in *Beach v. Macon Grocery Co.*, 8 Am. B. R. 751, 116 Fed. 143.

48. For instance, see *In re Russell*, 3 Am. B. R. 658, 101 Fed. 248. But it may be questioned whether this doctrine of comity has not been carried too far in such cases, as *In re Shoemaker*, 7 Am. B. R. 437, 112 Fed. 648, and *In re Wells*, 8 Am. B. R. 75, 114 Fed. 225. As to this, see Section Eleven of this work, and "Injunctions other than against Suits," post, in this Section.

49. *In re Lengert Wagon Co.*, 6 Am. B. R. 535, 110 Fed. 927; *Mauran v. Crown Carpet Cleaning Co.*, 6 Am. B. R. 734; *Carling v. Seymour Lumber Co.*, 8 Am. B. R. 80, 113 Fed. 483; *In re Watts*, 10 Am. B. R. 113, 124, 190 U. S. 1, 23 Sup. Ct. 718. It has even been held that the state court which yields possession may

retain the costs and expenses of its officer. *Wilson v. Parr*, 8 Am. B. R. 230. This rule was convincingly challenged in *In re Rogers*, 8 Am. B. R. 723, 116 Fed. 435.

49a. *Beach v. Macon Grocery Co.*, 11 Am. B. R. 104, 125 Fed. 513, 60 C. C. A. 557.

50. *In re Scott*, 3 Am. B. R. 625, 96 Fed. 607; *In re Adams Sartorial Co.*, 4 Am. B. R. 107, 101 Fed. 215; *In re Kelly Dry Goods Co.*, ante.

51. See "Additional Compensation," the next paragraph but two, and under Sections Forty and Forty-eight.

52. Compare Section Forty-eight. For the compensation of state court receivers who have surrendered to receivers in bankruptcy, see *Mauran v. Crown Carpet Cleaning Co.*, *supra*, and cases cited in the same foot-note.

skill and success they may be allowed the maximum compensation allowed to trustees under that section.<sup>52a</sup>

*Practice.*—The practice on receiverships is simple. Application should be made to the judge before adjudication and reference; afterwards to the referee.<sup>53</sup> It is by petition or on affidavits of parties in interest, showing the requisite facts. The analogies of the statute suggest that it be accompanied with a consent, signed by a goodly number of creditors, and a request that a named person be appointed; or, if not so accompanied, the appointment may be withheld until the wishes of creditors can be ascertained. The order of appointment should fix the amount of the receiver's bond, and distinctly specify his powers and duties. Should he find the order insufficient, he may, of course, apply for modifications, fixing or increasing his powers. He should be ready at the first meeting of creditors with a report and account, which should then be audited and his allowance fixed; whereupon he should turn over the property to the trustee. This procedure rests on custom and the analogy of the administrative features of the statute, rather than on the law or the rules of the courts.<sup>54</sup>

*Continuance of a Going Business.*—Section 2 (5) merely confers a power undoubtedly inherent in the court. The chief function of a bankruptcy law is to distribute an insolvent's assets *pro rata*; this implies the power to marshal those assets. In ordinary cases, a court of bankruptcy will go no farther. Yet occasion will often arise where a going business may be preserved and advantageously sold by keeping it alive under the management of the trustee. By this subdivision, courts of bankruptcy are vested with ample power to that end.

*Additional Compensation; Amendment of 1903.*—The trustee's compensation for so conducting a business—the compensation of trustees having been, prior to the amendments of 1903, based on moneys received and paid out, rather than work done—has been considered in two districts.<sup>55</sup> To remove the doubt and provide for a contingency which frequently arises, the Ray bill added to this

<sup>52a</sup>. In re Richards, 11 Am. B. R. 581, 127 Fed. 772.

<sup>53</sup>. Mueller v. Nugent, 181 U. S. 1, 7 Am. B. R. 224; In re Florcken, 5 Am. B. R. 802, 107 Fed. 241.

<sup>54</sup>. But see Forms Nos. 8 and 10. These are only useful when the marshal is made custodian. Since

the Act of May 28, 1896, he cannot be appointed receiver. Receivership forms will be found in "Supplementary Forms," post.

<sup>55</sup>. In re Epstein, 6 Am. B. R. 191, 109 Fed. 879; In re Plummer, 3 Am. B. R. 320.

subdivision the words: "and allow such officers (*i. e.*, the receivers, marshals, or trustees who conduct a going business) additional compensation for such services," and dropped the words: "as full compensation" from the first line of § 48-a. As previously explained,<sup>56</sup> this discretion was limited by the Senate amendments. Receivers and similar officers can now be allowed compensation, but only at the percentages of the trustee on "moneys disbursed."

**Subds. (4) (13) (16). To Punish for Crime, to Enforce Obedience to Lawful Orders, and to Punish for Contempts Committed Before Referees.**—These special powers are conferred by subdivisions (4), (13), and (16). They are among the most important possessed by courts of bankruptcy.

*Punishment for Violations of the Act.*—For a discussion of this power, see under § 29-b, *post*. As to the right to a jury trial, see § 19-c.

*Enforcement of Obedience to Lawful Orders.*—This power is inherent in the court. It may be exercised against any person, but the order must be lawful.<sup>57</sup>

*Punishment for Contempt.*—This power is as old as the law itself.<sup>58</sup> In many cases, as where the bankrupt or another contumaciously keeps property belonging to the estate in his possession, it is essential to the proper administration of the act. It must appear that the person complained of was acting in bad faith and for the purpose of evading the provisions of the law; thus an attorney who in good faith but wrongly advises a state court as to the right of such court to compel a receiver in bankruptcy to surrender property in controversy cannot be adjudged guilty of contempt.<sup>58a</sup> The proceeding is quasi criminal, yet not one entitling the person proceeded against to a trial by jury.<sup>59</sup> It is not an infringement of the constitutional prohibition on imprisonment for debt; but a bankrupt cannot be imprisoned indefinitely for a contempt.<sup>60</sup> It must definitely appear that the bankrupt is in possession of money belonging

56. See p. 17, *ante*.

57. Compare a similar phrasing in § 7-a (2) and in § 14-b (6). See footnote 62, *post*, for cases indicating what orders may be unlawful.

58. See *Ex parte Robinson*, 86 U. S. 505.

58a. *In re Watts*, 10 Am. B. R. 113, 190 U. S. 1, 23 Sup. Ct. 718.

59. *In re Debs*, 158 U. S. 564.

60. *In re Anderson*, 4 Am. B. R. 640, 103 Fed. 854; *In re Schlesinger*, 4 Am. B. R. 361, 102 Fed. 117; *In re Leinweber*, 12 Am. B. R. 175, 128 Fed. 641; *In re Taylor*, 7 Am. B. R. 410, 114 Fed. 607.

to the estate, and is withholding it wrongfully.<sup>60a</sup> But the obligation of a bankrupt to surrender to the trustee property in his possession which belongs to the trustee and not to him, cannot be converted into a debt at his option by a mere failure to comply with the order of the court.<sup>60b</sup> A recent case in the Supreme Court, *Mueller v. Nugent*,<sup>61</sup> settles most of the mooted questions.

*Illustrative Cases.*—These will be found in the foot-note.<sup>62</sup>

60a. *In re Adler*, 12 Am. B. R. 19, 129 Fed. 902.

60b. *Schweer v. Brown* (C. C. A.), 12 Am. B. R. 178, 130 Fed. 328; *In re Adler*, supra.

61. 148 U. S. 1, 7 Am. B. R. 224, and forms quoted therein. Compare *In re Nugent* (D. C.), 4 Am. B. R. 747, 104 Fed. 530; s. c., on appeal, 5 Am. B. R. 176, 105 Fed. 581.

62. This jurisdiction, being summary, should be exercised with great caution (*In re McCormick*, 3 Am. B. R. 340; *In re Gottardi*, 7 Am. B. R. 722; *In re Kane*, 10 Am. B. R. 478, 125 Fed. 984). And compare *In re Schlesinger*, 3 Am. B. R. 342, 97 Fed. 930). Where title to the property is held adversely by another under a claim of right, it cannot be exercised against either the bankrupt or that other (*In re Mayer*, 3 Am. B. R. 533, 98 Fed. 839); but it may be if the property claimed is in the bankrupt's possession (*In re Gottardi*, supra). A mere threat to interfere with the property is not enough (*In re McBryde*, 3 Am. B. R. 729). It must at least appear, first, that the property is part of the bankrupt's estate, and, second, that the person ordered to deliver it has control of it at the time (*In re Rosser*, 4 Am. B. R. 153, 101 Fed. 562. See also *In re Wilson*, 8 Am. B. R. 612, 116 Fed. 419). Where it appears that money in the bank was taken by the bankrupt after a petition in involuntary bankruptcy was filed, but before adjudication, and it does not seem probable that the money was expended for the support of his family, it will be held to be under his control, and he may be adjudged in contempt for a failure to turn it over to his trustee (*In re Kane*, 10 Am. B. R. 478, 125 Fed. 984; *In re Gerstel*, 10 Am. B. R. 411, 123 Fed. 166). Loss of money in

gambling is not a sufficient defense (*Ripon Knitting Works v. Schrieber*, 4 Am. B. R. 299, 101 Fed. 810); but the court will not seek to use this process to compel an impossibility (*Boyd v. Glucklich*, 8 Am. B. R. 393, 116 Fed. 131; *Sinsheimer v. Simonson*, 5 Am. B. R. 537, 107 Fed. 808; *Schweer v. Brown* (C. C. A.), 12 Am. B. R. 178, 130 Fed. 328; *In re Adler*, 12 Am. B. R. 19, 129 Fed. 902). The sole purpose of it is to reach and compel the surrender to the trustee of property belonging to the estate in the actual control or possession of the bankrupt (*In re Gerstel*, 10 Am. B. R. 411, 123 Fed. 166). The recent affirmation of the *Sinsheimer* case by the Supreme Court (*Louisville Trust Co. v. Cominger*, 184 U. S. 18, 7 Am. B. R. 421) has caused some alarm. Its limitations, i. e., to cases where the adverse claimant obtained possession under a claim of right and without knowledge of a pending bankruptcy proceeding (see *Bryan v. Bernheimer*, supra), and where the court is satisfied as to impossibility of compliance, make it comparatively innocuous. To same effect, see *In re Carver & Co.*, 7 Am. B. R. 539, 113 Fed. 128. The whole question is ably discussed in *In re Tune*, 8 Am. B. R. 285, 115 Fed. 906. Compare also under Section Twenty-three, post, and see *In re Greenburg*, 5 Am. B. R. 840, 106 Fed. 496; *In re Levin*, 6 Am. B. R. 743; *In re Arnett*, 7 Am. B. R. 523, 112 Fed. 770. But contempt cannot be adjudged save on notice and after an opportunity to be heard (*In re Rosser*, supra). While referees cannot punish for contempt (§ 41-b), they can, as courts of bankruptcy, order the surrender of assets, and refusal to obey such orders will be contempt (*Mueller v. Nugent*, supra).



*Practice.*— That of the Nugent<sup>63</sup> case is a safe guide. There, on the verified petition of the trustee, the referee issued a show cause to the party alleged to be in possession of the property, coupled with an injunction. On the return day, a response on behalf of the claimant was filed. The matter was then heard summarily by the referee, who found the response insufficient. Thereupon, the referee granted an order directing a surrender to the trustee within a limited period. On default being made, the referee certified the facts to the judge, recommending that the respondent be punished and committed for contempt. In this case, a review of this order was asked. The same result would have been accomplished had the respondent appeared voluntarily before the judge and brought up the whole matter on the merits, the judge not being in such case bound by the findings of fact of the referee.<sup>64</sup> The judge, with all the facts thus before him, affirmed the order of the referee, found the respondent guilty of contempt, and called him to the bar for commitment. This practice is not fixed by rules. It may be varied to fit the circumstances of each case. Valuable precedents will be found in the Supreme Court decisions controlling on the procedure to punish for contempts in other than courts of bankruptcy. The bankrupt's denial of possession is not conclusive,<sup>64a</sup> nor will the court be deceived by evasions, or deterred by consequences.<sup>64b</sup>

*Contempts Committed in the Presence of Referees; Assault Upon Trustee.*— Subdivision (16) seems merely to confer on the judge power to punish for contempts other than those in his presence or of his own orders. He has the usual power, irrespective of statute, to punish for contempt committed in his presence. If the contempt is committed in the presence of the referee, § 41 applies. The district court may summarily try and determine the question as to whether an assault upon a trustee, as an officer of the court, had been committed, and if so whether it was a contempt of court.<sup>64c</sup>

**Subd. (6). To Bring in Additional Parties.**— *Bryan v. Bernheimer, supra*, is an instance where this power was recognized. Another is where a nonjoining partner may be brought into a pro-

63. See foot-note 61, *supra*.

64. In re Mayer, 3 Am. B. R. 533, 98 Fed. 839.

64a. Schweer v. Brown (C. C. A.), 12 Am. B. R. 178, 130 Fed. 328; In re

Gerstel, 10 Am. B. R. 411, 123 Fed. 166.

64b. In re Kane, 10 Am. B. R. 478, 125 Fed. 984.

64c. Ex parte O'Neal, 11 Am. B. R. 196, 125 Fed. 967.

ceeding.<sup>65</sup> Still another is where a creditor inadvertently omitted from the schedule is brought in on show cause after the first meeting. The rule under the former law, that strangers to the proceeding cannot be compelled to come in, is probably still the law; for subsection (6) refers only to "proceedings in bankruptcy."<sup>66</sup> Under the *Bardes* case, the consent of the proposed defendant was necessary, where the stranger to the proceeding claimed title adversely. Since the amendment of 1903, however, this distinction is not important. The court can order the trustee to sue in the district court, and thus in effect bring in strangers to proceedings in bankruptcy.

**Subds. (7) (8) (9). To Marshal and Distribute Assets, Close and Reopen Estates, and Confirm Compositions.**—These administrative powers go hand in hand.

*Collection and Distribution.*—The law of 1867<sup>67</sup> had similar words. Precedents under that law will be found valuable. The power to turn a bankrupt's estate into money and distribute it *pro rata* would probably flow from subdivision (15), were it not specifically conferred by subdivision (7). It is a broad power and should be liberally construed to accomplish the purposes of the act. It includes the power to preserve the estate, as well as the power to sell. Hence, it comprises the power to enjoin those who would interfere with the due administration of assets.<sup>68</sup> It applies to the powers of receivers or the marshal to take charge of property of bankrupts in the hands of third persons after the filing of the petition, and until it is dismissed or the trustee has qualified.<sup>68a</sup> This power extends even to a refusal to administer burdensome property.<sup>69</sup> Under the present law, it has been asserted to the extent of ordering an assessment for unpaid subscriptions upon the stockholders of a bankrupt corporation.<sup>70</sup> This function of courts of bankruptcy is also considered under other sections of this work.<sup>71</sup>

65. In re O'Brien, 2 N. B. N. Rep. 312.

66. See *Sinsheimer v. Simonson*, supra, and foot-note 62.

67. § 1; R. S., § 4972.

68. See under Section Eleven. See also "Effect of Bryan v. Bernheimer," supra, and "Injunctions other than against Suits," post; both in this Section.

68a. *McNulty v. Feingold*, 12 Am. B. R. 338, 129 Fed. 1001.

69. Discussed under Section Seventy.

70. In re Miller Electrical Maintenance Co., 6 Am. B. R. 701, 111 Fed. 515.

71. For instance, see: for stays, §§ 2 (15) and 11; for suits to collect, § 23; for suits to recover property

*Settlement of Controversies.*—This jurisdiction, prior to the amendatory act of 1903, depended on who were the parties to the suit.<sup>72</sup> Since then, as to suits to recover property, it depends, as did the same jurisdiction under the law of 1867, on the subject-matter.<sup>73</sup> If the property or fund is in the possession of the court, represented by one of its officers, as a receiver or trustee, controversies in respect thereto are clearly within its jurisdiction.<sup>73a</sup>

*Closing Estates.*—This can only be done when it appears that they are finally administered. The general policy of the law requires that it be done speedily.<sup>74</sup>

*Reopening Estates.*—This frequently becomes necessary. The common cause is the discovery of additional assets. But, in such a case, the allegations of the petition to reopen must be such as to satisfy the court that assets exist.<sup>75</sup> It has been held that, where the time to file claims has expired, a reopened case will redound to the benefit only of creditors whose claims were allowed in the original proceeding.<sup>76</sup> It frequently becomes necessary to reopen estates that there may be a trustee on whom process may be served; thus, where burdensome property has vested in the trustee, and, by inadvertence, he has not been formally excused from taking the same, and a mortgagee wishes to foreclose. The practice is simple—an *ex parte* application to the judge for an order reopening, and, if

preferentially or fraudulently transferred, §§ 60-b, 67-e, and 70-e; for general duties of the trustee, § 47; for payment of dividends, § 65.

72. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163. But subsection (7) applies only where the trustee is the adverse claimant, and leave to sue him in the state court will be denied. In *re McCallum*, 7 Am. B. R. 596, 113 Fed. 393. See also In *re Siegel-Hillman Co.*, 7 Am. B. R. 351, 111 Fed. 983, and In *re Kellogg*, 7 Am. B. R. 623, 113 Fed. 120; *affd.*, 11 Am. B. R. 7, 121 Fed. 333, 57 C. C. A. 547, holding on appeal that the controversies in relation to the bankrupt estate which do not come within the jurisdiction of the bankruptcy court are those where the trustee must bring suit to assert title to property not in his possession or under his control. Where, even before the amendment, the claimant is also a bankrupt, jurisdiction to decide be-

tween the two estates exists; In *re Rosenberg*, 8 Am. B. R. 624, 116 Fed. 402.

73. *Kelly v. Smith*, Fed. Cas. 7,-675. Under law of 1841, *Buckingham v. McLean*, 13 How. 151. See also under Section Twenty-three.

73a. In *re Antigo Screen Co.*, 10 Am. B. R. 359, 123 Fed. 249, 58 C. C. A. 248; In *re Leeds Woolen Mills*, 12 Am. B. R. 136, 129 Fed. 922, holding further that the jurisdiction once acquired cannot be defeated by the surrender of the property to the alleged rightful owner.

74. In *re Carr*, 8 Am. B. R. 635, 116 Fed. 556. See generally under Section Forty-seven, and, as to when an estate is "closed," under Sections Eleven and Fifty-five.

75. In *re Newton*, 6 Am. B. R. 52, 107 Fed. 439; *Matter of Paine*, 11 Am. B. R. 351, 127 Fed. 246.

76. In *re Shaffer*, 4 Am. B. R. 728, 104 Fed. 982.

granted, a reference to the referee and a meeting of creditors on notice, with the other subsequent proceedings as in the original case.<sup>77</sup> Creditors who have not proved their claims cannot apply for the relief.<sup>77a</sup>

*Compositions.*—Compositions recognized and specified in Section Twelve, only, may be confirmed by the court or judge under § 2 (9).<sup>77b</sup> For full discussion, see Sections Twelve and Thirteen.

**Subd. (10). To Review Decisions by Referees.**—This power and the practice on such reviews is discussed in Section Thirty-eight.

**Subds. (11) (12) (14). To Determine Exemptions, Consider Discharges and Extradite Bankrupts.**—For discussion of these powers, see Sections Six, Fourteen, and Ten, respectively, *post*.

**Subd. (15). To Enforce the Act by Necessary Orders, Process, or Judgments.**—This is the omnibus clause of the section. Generally speaking, it may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against, the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter. Thus, under it, a bankrupt may be compelled to perform other duties than those enumerated in Section Seven;<sup>78</sup> and, as has been seen, a court may through it extend the powers of receivers appointed under § 2 (3); while the power to compel the surrender by a bankrupt of his property springs from this subdivision, just as the power to punish for contempt for not doing it does from subdivision (13).

*Injunctions Other than against Suits.*—The power to enjoin is inherent in the court of bankruptcy as a court of equity. It includes the power to grant stays, conferred by § 11, of pending suits in other courts. That the broad phrasing of subdivision (15) amounts to an express ratification of this inherent power has not been doubted. The exercise of it, like the quasi-criminal remedy of contempt, is essential to the due enforcement of the act. Early in the administration of the present law, the injunction was frequently used to prevent the dissipation of assets to which the bankrupt had title,<sup>79</sup> as was the additional process of seizure when the act com-

<sup>77</sup> Id.

<sup>77a</sup> Matter of Paine, 11 Am. B. R. 351, 127 Fed. 246.

<sup>77b</sup> In re Frear, 10 Am. B. R. 199, 202, 120 Fed. 978.

<sup>78</sup> Compare In re Lipke, 3 Am.

B. R. 569, 98 Fed. 970, as limited by In re Ketchum, 5 Am. B. R. 532.

<sup>79</sup> For instance, see In re Gutwillig, 1 Am. B. R. 388, 92 Fed. 337, which is typical of the earlier cases, and In re Kleinhans, 7 Am. B. R.

plained of amounted to an act of bankruptcy or other fraud on the act.<sup>80</sup> Where, however, the property at which the process was aimed was claimed adversely by another and in that other's possession, the Supreme Court's decision in the *Bardes* case at once made it doubtful whether this jurisdiction could longer be exercised.<sup>81</sup> This doubt has now been removed by the amendments of 1903.<sup>82</sup> It may be suggested, however, that, *Bryan v. Bernheimer*, *supra*, having affirmed the doctrines of the earlier decisions and to that extent limited the *Bardes* case, the power to take a bankrupt's property from the possession of one who holds it under a transfer which is in itself an act of bankruptcy, and the lesser power of enjoining his disposition of it, have always been available.<sup>83</sup> Indeed, the reasoning of *Bryan v. Bernheimer* indicates that, where the possession, though adverse, is through an act which amounts to a fraud on the law, though possibly not an act of bankruptcy, the power to enjoin existed even before the amendment of § 23-b by the Act of 1903.<sup>84</sup>

*Practice.*—This protective process is frequently resorted to in involuntary cases, sometimes being included in and sometimes following the order appointing a receiver. Where possible, the order granted should be in the nature of a temporary stay, coupled with a show cause returnable on a day certain. The use of the writ itself is, however, not unusual, and, there being no limitation on its operation, as there is on the writ issued under § 11, it remains in force until modified or dissolved. Any one aggrieved can, on proper notice, move to dissolve. The application both for and to dissolve the injunction may be made on petition or affidavits, entitled in the case, and, if after the adjudication, should be made to the referee. It has been thought that the referee can grant no more than a tem-

604, 113 Fed. 107; *In re Smith*, 8 Am. B. R. 55; *In re Tune*, 8 Am. B. R. 285, 115 Fed. 906, and *In re Gutman*, 8 Am. B. R. 352, 114 Fed. 1009, among the later cases. Nor is it thought that the late cases, of which *In re Shoemaker*, 7 Am. B. R. 437, 112 Fed. 648, and *In re Wells*, 8 Am. B. R. 75, 114 Fed. 222, are typical, have, save in their respective districts, abridged this very necessary power. Verbal notice of the injunction has been held enough, *In re Krinsky Bros.*, 7 Am. B. R. 535, 112 Fed. 972. For analogous cases, see

also under Section Eleven of this work.

80. *In re Etheridge Furniture Co.*, 1 Am. B. R. 112, 92 Fed. 329; *In re Sievers*, 1 Am. B. R. 117, 91 Fed. 366; *In re Gottardi*, 7 Am. B. R. 723.

81. See *In re Ward*, 5 Am. B. R. 215, 104 Fed. 985.

82. See Section Twenty-three.

83. See *In re Bender*, 5 Am. B. R. 632, 106 Fed. 873; s. c., on appeal sub nom. *In re Young*, 7 Am. B. R. 14, 111 Fed. 158.

84. Note also *In re Currier*, 5 Am. B. R. 639.

porary stay, the Supreme Court having, by General Order XII, limited the granting of injunctions on suits to the judge. But this general order affects the injunction here discussed only by analogy. Since *Mueller v. Nugent*, *supra*, it would seem that the referee, being vested with all the functions of a court of bankruptcy save a few, not inclusive of the power to enjoin, may grant permanent injunction orders having all the force of like orders issuing from the judge, and also direct the clerk to issue the writ under the seal of the court. Forms will be found in "Supplementary Forms," *post*.

*Precedents under the Law of 1867.*—For precedents as to principles as well as practice, see discussion of injunctions against suits under Section Eleven.<sup>85</sup>

**Subd. (17). To Appoint Trustees.**—For discussion of this power, see Sections Forty-four and Sixty-six. General Order XIII should also be consulted.

**Subd. (18). To Tax Costs.**—Costs taxable under subdivision (18) are something different from the costs of administration, consisting of the fees and mileage of witnesses, and the allowances to the attorneys.<sup>86</sup> Costs must be allowed in all involuntary cases where the adjudication is contested.<sup>87</sup> Only costs allowed by law may be taxed. Where there is no specific provision,<sup>88</sup> this subdivision seems to assimilate costs in bankruptcy to those under the equity practice in the United States courts.<sup>89</sup> Under the former law, it was held that costs might be allowed the prevailing party in a proceeding to set aside a discharge;<sup>90</sup> under the present law, the same has been held as to a proceeding for a discharge.<sup>91</sup> Precedents as to costs on appeal will be found in the foot-note.<sup>92</sup> It seems, too, that, under the previous law, costs were allowed against creditors who unsuccessful-

85. See also *Irving v. Hughes*, Fed. Cas. 7,076; *In re Muller*, Fed. Cas. 9,912; *Kellogg v. Russell*, Fed. Cas. 7,666; *U. S. ex rel. Hyde v. Bancroft*, Fed. Cas. 14,513; *In re South Side R. R. Co.*, Fed. Cas. 13,190.

86. See generally in Sections Sixty-two and Sixty-four.

87. See § 3-e and General Order XXXIV. See also *In re Ghiglione*, 1 Am. B. R. 580, 93 Fed. 186; *In re Morris*, 7 Am. B. R. 709, 115 Fed. 591.

88. As, for instance, in § 3-e.

89. See the Equity Rules and local rules in the different districts.

90. *In re Holgate*, Fed. Cas. 6,601.

91. *Bragassa v. St. Louis Cycle*, 5 Am. B. R. 700, 107 Fed. 77. Compare also *In re Wolpert*, 1 Am. B. R. 436, and *In re Gaylord*, 5 Am. B. R. 805.

92. *In re Orman*, 5 Am. B. R. 698, 107 Fed. 101; *In re Dickson*, 7 Am. B. R. 186, 111 Fed. 726; *Matter of Josephson*, 9 Am. B. R. 608, 121 Fed. 142.

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fully contested the validity of claims,<sup>93</sup> and that, if the trustee refused to object to claims, creditors successfully contesting the same were allowed costs out of the estate.<sup>94</sup> Where an involuntary petition is dismissed for want of jurisdiction costs cannot be allowed to the successful party.<sup>94a</sup> But costs, to be taxable under this subdivision, must be incurred "in proceedings in bankruptcy." Costs may be taxed by the referee.<sup>95</sup>

**Subd. (19). To Transfer Cases.**— This is discussed under Section Thirty-two.

<sup>93</sup>. In re Troy Woolen Co., Fed. Cas. 14,203.

<sup>94</sup>. In re Little River Lumber Co., 3 Am. B. R. 682, 101 Fed. 558.

<sup>94a</sup>. In re R. H. Williams, 9 Am. B. R. 736, 120 Fed. 34.

<sup>95</sup>. In re Scott, 7 Am. B. R. 710.

## SECTION THREE.

### ACTS OF BANKRUPTCY.

§ 3. **Acts of Bankruptcy.**— *a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States;*\* or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

*b* A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

*c* It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition

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\*Amendment of 1903 in italics.



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against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

*d* Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

*e* Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

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**Analogous provisions:** In U. S.: Act of 1867, § 39 (as amended by Act of July 27, 1868), R. S., § 5021 (as amended by Acts of June 22, 1874, and July 26, 1876); Act of 1841, § 1; Act of 1800, §§ 1, 2.

In Eng.: Act of 1883, § 4; Act of 1890, § 1.

**Cross references:** To the law: Generally to § 2 on definitions; and as to *a* (1), §§ 14-b (4), 67-c, 70-e; *As to a* (2), §§ 60-a-b, 67-c (1); *As to a* (3), §§ 60-a, 67-c (1), f; *As to b*, §§ 4, 59, 60-a-b; *As to c*, §§ 18-b-c-d,

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19; 21; *As to d*, the same; *As to e*, §§ 2, (3) (15); 69-a. Compare also "Supplementary Section to Amendatory Act," post.

**To the General Orders:** Generally to V, VI, VII, VIII, and IX.

**To the Forms:** Nos. 3, 4, 5, 6, 7, 8, 9, 10.

## SYNOPSIS OF SECTION.

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**V. Subs. d. Solvency and the Second and Third Acts of Bankruptcy.**

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**VI. Subs. e. Bond on Taking Possession of Bankrupt's Property Before Adjudication.**

**Bond.**

**Remedies Under.**

**I. ACTS OF BANKRUPTCY IN GENERAL.**

**History and Analogies.**—In most of the continental bankruptcy systems, acts of bankruptcy, in our sense of the term, are unknown. Mere cessation of payment is enough to entitle the creditors to resort to the court. In France, the debtor is legally bound to notify the court that he has stopped payment. Indeed, in several of the Latin systems, the court may declare a debtor a bankrupt on its own motion. Anglo-Saxon jurisprudence, while allowing the debtor to initiate bankruptcy by his own declaration or petition, not only does not otherwise permit the court to adjudicate save at the instance of creditors, but even affords further protection against arbitrary or unjust interference with the property of the individual, by providing that he shall not be amenable to bankruptcy unless he has done or suffered certain acts which either amount to actual or constructive frauds on creditors or are tantamount to declarations of hopeless insolvency. Hence, what we call “acts of bankruptcy.”

*Comparative Legislation.*—The present English act,<sup>1</sup> as supplemented by § 1 of the amendatory act of 1890, specifies eight acts of bankruptcy, four of which<sup>2</sup> are practical equivalents of the first, second, fourth, and fifth acts found in § 3-a of our law. Of the others, absconding or concealing himself<sup>3</sup> is ancient, while of the remaining three an unpaid levy outstanding for twenty-one days<sup>4</sup> is

1. Act of 1883, § 4.

2. Id., § 4 (1)-a-b-c-f.

3. Id., § 4 (1)-d.

4. Act of 1890, § 1.

but little more drastic than is our third act of bankruptcy, and the giving of a notice by the debtor that he has suspended payments,<sup>5</sup> or the failure on his part to respond within seven days to a demand to pay a final judgment,<sup>6</sup> are but statutory recognition of the continental doctrine that cessation of payments and the status of bankruptcy are one and the same thing. The two systems, therefore, aside from the difference which grows out of our definition of insolvency, are, as to acts of bankruptcy, near akin. There has been a like paralleling at other periods.<sup>7</sup>

*Former United States Statutes.*—The acts of bankruptcy in our statute of 1800<sup>8</sup> were largely copied from those then in force in England. Of the six acts of bankruptcy in the law of 1841,<sup>9</sup> only three, the procuring or suffering of a levy or attachment, the concealing of property with intent to prevent a levy, and the fraudulently conveying or transferring of property, are similar to those now available; only the last is in effect an equivalent. There were nine acts of bankruptcy under the law of 1867. The third and fourth are comprised within the present § 3-a (1), and the eighth is similar to our § 3-a (2). Here the similitude ends, save that the making of a general assignment became by judicial construction in effect a tenth act of bankruptcy. Our third act is new, as is our fifth. We certainly have now nothing like such once well-known acts of bankruptcy as the alleged bankrupt's abscondence, or being in custody on a civil judgment, or, if a banker, merchant, trader, or manufacturer, stoppage of payment for a specified period. The decisions under the former law, while, of course, valuable, are not always controlling.<sup>10</sup> The practitioner, when citing, should observe the changes in § 39 of the former statute made by the acts of June 22, 1874, and July 26, 1876. It is often important, too, to note the difference in phrasing between the two statutes, even where there is a seeming equivalence.<sup>11</sup>

5. Act of 1883, § 4 (1)-h.

6. *Id.*, § 4 (1)-g.

7. Compare the English Act of 1869 with our law of 1867.

8. Act of 1800, § 1.

9. Act of 1841, § 1.

10. Compare *Wilson v. City Bank*, 17 Wall. 473, with *Wilson v. Nelson*, 183 U. S. 191, 7 Am. B. R. 142.

11. As bearing on the purpose of

Congress in limiting the acts of bankruptcy to those discussed in detail, post, reference to the Torrey bill in its latest form, the so-called Lindsay bill (See § 40, S. 1032, 55th Congress, 1st Session; and compare also § 2 of the Henderson substitute, Cong. Rec. 55th Congress, 2d Session, Vol. 31, p. 2038) will prove suggestive.

§ 3.]

Construction of Section; Insolvency.

**Construction of the Section.**—Section 3 relates wholly to involuntary bankruptcy. It clearly indicates what wrongdoing or acts on the part of the bankrupt must be alleged in the creditors' petition and established by them as a part of their proof on the trial. Such a petition, prepared after carefully observing the provisions of this section, and of § 4-b, indicating against whom such a petition may be filed, and § 59-b, declaring by whom it may be filed, and § 2 (1), specifying where it may be filed, and § 18-a, indicating how it is served, and § 63-a-b, specifying what are petitioning creditors' debts, will, provided the act of bankruptcy relied on is alleged with sufficient detail, render the petitioners reasonably secure against a plea in the nature of a demurrer.<sup>12</sup>

**Strict Construction.**—The purpose of the act as a whole is remedial; but this portion of it, while not penal, is in derogation of common-law rights. The higher courts have, therefore, quite uniformly refused to read into this and the corresponding sections of previous laws, meanings which do not appear from the very words.<sup>13</sup> Strong reasons may, however, be urged for a liberal construction. The law was intended to compel prorating, by halting frauds and checking preferences. As has been seen, defined acts of bankruptcy are merely limitations expressive of the caution inherent in Anglo-Saxon jurisprudence when dealing with the rights to property. Being limitations on the operation of a statute that is highly remedial, a broad construction, while not perhaps so safe, would in the long run accomplish more equity.<sup>14</sup> As a rule, the statute as an entirety, as well as its sections other than § 3, are liberally construed.<sup>15</sup>

**Insolvency; when Essential.**—Insolvency has in all bankruptcy laws been a most important element of allegation and proof. Yet, where the act of bankruptcy consists of a general assignment for the

12. Compare Form No. 3, and "Creditors' Petitions in Involuntary Bankruptcy," by Mr. Collier, 1 N. B. N. 62.

13. Jones v. Sleeper, Fed. Cas. 7,496; Wilson v. City Bank, ante; In re Empire Metallic Bedstead Co., 3 Am. B. R. 575, 98 Fed. 581.

14. Compare, as tending to support this view, In re Gutwillig, 1

Am. B. R. 78, 90 Fed. 475; In re Adams, 1 Am. B. R. 94; Southern Loan & Trust Co. v. Benbow, 3 Am. B. R. 9, 96 Fed. 514; Silverman's Case, Fed. Cas. 12,855; In re Mueller, Fed. Cas. 9,912.

15. For instance, see Blake v. Francis Valentine Co., 1 Am. B. R. 372, 89 Fed. 691.

benefit of creditors,<sup>16</sup> insolvency is immaterial.<sup>17</sup> Under the present definition, it is conceivable that a debtor who "admits in writing his inability to pay his debts"<sup>18</sup> may still be solvent; yet insolvency need not be alleged or shown. But it is either a necessary element of, or its opposite, a conclusive defense to, the other acts of bankruptcy.<sup>19</sup> A general averment in an answer, that no act of bankruptcy, such as is charged, has been committed, may be deemed sufficient as a denial of insolvency, although if insolvency be alleged as a material element, it would be better to specifically deny the insolvency at the time the act was committed.

**Illustrative Cases.**—Suggestive cases on what constitutes insolvency and when it must be shown to have existed will be found in the foot-note.<sup>20</sup>

## II. ACTS OF BANKRUPTCY UNDER PRESENT LAW.

### Subs. a (1). First Act of Bankruptcy; a Fraudulent Transfer.—

There is a very patent distinction between the first and the second acts of bankruptcy.<sup>21</sup> An intentional preference will, in most cases, amount to a transfer with intent to hinder, delay, or defraud. The acts referred to in this subsection are: those conveyances or transfers, made with intent to hinder, delay, or defraud, which were interdicted by the Statute of Frauds,<sup>22</sup> now a part of the law of nearly every State. Just what transactions will furnish a legal presumption of this fraudulent intent depends largely on the state decisions.

16. § 3-a (4).

17. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463.

18. See under subs. a (5), post.

19. As to what constitutes insolvency, see § 1 (15), ante, and the cases cited.

19a. *Troy Wagon Works v. Vastbinder*, 12 Am. B. R. 352, 130 Fed. 232.

20. If the debtor's goods have been sold on execution, at a fair sale, just prior to bankruptcy, this will fix their value (*In re Martin*, 1 N. B. N. 301). A general letter to creditors admitting insolvency will outweigh mere estimates (*In re Lange*, 3 Am. B. R. 231, 97 Fed. 196). Where partnership assets are insufficient, but the assets of the individuals after paying their debts are enough to make up the deficiency in their joint venture,

the partnership is not insolvent (*In re Blair*, 3 Am. B. R. 588, 96 Fed. 76; *Vaccaro v. The Security Bank*, 4 Am. B. R. 474, 103 Fed. 436). Insolvency must exist at the time of the act complained of (*In re Rome Planing Mills*, post); that the act of bankruptcy itself brought about the insolvency is not enough (*Chicago Title & Trust Co. v. Roebing's Sons*, 5 Am. B. R. 368, 107 Fed. 71). The finding of the referee on the facts that insolvency exists will not, as a rule, be disturbed (*In re Rome Planing Mills*, 3 Am. B. R. 766, 99 Fed. 937).

21. *In re Mingo Valley Creamery Assn.*, 4 Am. B. R. 67, 100 Fed. 282.

22. 13 Eliz. chap. 5. See *Githens, etc., Co. v. Shiffler Bros.*, 7 Am. B. R. 453, 112 Fed. 505.

§ 3a (1).]      Fraudulent Transfer; Intent; Insolvency.

A few precedents will be found in the foot-note<sup>23</sup> and in the citations of the next paragraph.

*Intent*.—An intent to defraud is essential under this clause.<sup>24</sup> It rarely can be established by direct proof.<sup>25</sup> It may be inferred from the act itself as a necessary consequence of it, or it may be established by admissions and declarations. The burden is, of course, on him who asserts it. Thus, in the absence of proof as to when or how assets were lost, the presumption is against fraud.<sup>26</sup> It is still an open question whether a voluntary receivership by an insolvent corporation under a state law may not be "with intent to hinder or delay creditors" and thus an act of bankruptcy, irrespective of the amendment of 1903.<sup>27</sup> The weight of authority seems to be that it is.<sup>27a</sup> In a proceeding instituted prior to the amendment of 1903 it was held that the appointment of a receiver of an insolvent partnership was not an act of bankruptcy under this clause.<sup>27b</sup> Thus, also, a transfer intended to delay was under the former statute held an act of bankruptcy.<sup>28</sup> Allegations that the defendant transferred his property with intent to hinder, delay or defraud his creditors should be specific if possible, but the purpose of the law does not require greater detail than it is probable that creditors can furnish.<sup>28a</sup>

*Insolvency*.—Here compare § 1(15), *ante*, for definition; and, as to burden of proof, see under § 3-c-d, *post*.

23. Githens, etc., Co. v. Schiffer Bros., *supra*. Compare Tiffany v. Lucas, 15 Wall. 410; In re Hussman, Fed. Cas. 6,951. A chattel mortgage to secure a present loan to pay certain creditors is an act of bankruptcy. In re Pease, 12 Am. B. R. 66, 129 Fed. 446.

24. In re Cowles, Fed. Cas. 3,297; In re McKibbin, Fed. Cas. 8,859; Fox v. Eckstein, Fed. Cas. 5,009; In re Belknap, 12 Am. B. R. 326, 129 Fed. 646; In re Wilmington Hosiery Co., 9 Am. B. R. 581, 120 Fed. 180; Lansing Boiler Works v. Ryerson & Son (C. C. A.), 11 Am. B. R. 558, 128 Fed. 701.

25. Van Wyck v. Seward, 18 Wend. 375, 395.

26. Davis v. Stevens, 4 Am. B. R. 763. Compare In re Shapiro & Novick, 5 Am. B. R. 839, 106 Fed. 495.

27. Compare under subs. a (4) in this Section, *post*. And see In re Em-

pire Metallic Bedstead Co., 1 Am. B. R. 136, 141 (this point not having been passed on when this case was subsequently reversed); In re Gutwillig, 1 Am. B. R. 388, at p. 390, 92 Fed. 337; In re Harper & Bros., 3 Am. B. R. 804, 100 Fed. 266, and Scheuer v. Smith, 7 Am. B. R. 384, 112 Fed. 407, and note West v. Lea, *ante*. See also "What is not a General Assignment" in this Section, *post*.

27a. See In re Wilmington Hosiery Co., 9 Am. B. R. 581, 120 Fed. 180, holding to the contrary. Compare Bean, etc., Mfg. Co. v. Spoke Co., 12 Am. B. R. 610.

27b. Matter of Burrell & Corr, 9 Am. B. R. 625, 123 Fed. 414, 59 C. C. A. 508.

28. In re Goldschmidt, Fed. Cas. 5,520.

28a. In re Mero, 12 Am. B. R. 171, 128 Fed. 630.

*Meaning of the Words of Devolution.*—"Convey" has its common meaning and is the equivalent of "grant." "Transfer" has a broad and generic meaning.<sup>29</sup> The payment of a partner's individual debts out of the assets of the partnership is, as to creditors of the partnership, a transfer.<sup>30</sup> For discussion of "conceal," see under § 29-b, *post*; also enlarged meaning given the word by § 1 (22). The word "removed," as used in this clause, signifies an actual or physical change in the position or locality of the property constituting the subject of the removal.<sup>30a</sup> A debtor who absconds and takes part of his property with him, both "conceals" and "removes."<sup>31</sup> Yet, when the *quantum* of the property is not kept under cover but remains visible, even though the transaction is fraudulent, it is not such a concealment as to amount to an act of bankruptcy.<sup>32</sup> Where property is removed by a creditor in the debtor's absence, and against his protest, the failure to take legal proceedings to recover such property is not an act of bankruptcy.<sup>32a</sup>

"*Creditors, or Any of Them.*"—This means one who owns a demand or claim provable in bankruptcy.<sup>33</sup>

*Comparison with Other Sections.*—If the fraudulent transfer is within four months of the filing of the petition, it is not only an act of bankruptcy but void under § 67-e; it is also an objection to discharge under § 14-b (4); and, if also voidable under the state laws, it may be set aside under § 70-e, and the property or its value recovered by proper proceedings begun within the limitations as to time fixed by the state statutes.<sup>34</sup>

**Subs. a (2). Second Act of Bankruptcy; a Preferential Transfer.**—The interdicted transaction here must be between a debtor and his creditor. Where at the time of the transfer there were no creditors, a subsequent creditor cannot complain.<sup>34a</sup> It is in itself not even illegal or fraudulent. The debtor merely *prefers* to pay one creditor

29. § 1 (25).

30. *Mattocks v. Rogers*, Fed. Cas. 9,300; *In re Gillette*, 5 Am. B. R. 119, 104 Fed. 769.

30a. *In re Wilmington Hosiery Co.*, 9 Am. B. R. 581, 120 Fed. 180, holding that the word "removed" has no application to the taking of property by a receiver of a corporation acting under competent authority.

31. *In re Filer*, 5 Am. B. R. 332,

108 Fed. 209. Note the additional word "destroyed" in § 14-b (4).

32. *Citizens' Bank v. De Pauw Co.*, 5 Am. B. R. 345, 105 Fed. 926.

32a. *In re Belknap*, 12 Am. B. R. 326, 120 Fed. 646.

33. Compare §§ 1 (9) and 63-a-b.

34. These doctrines are further considered in the appropriate Sections, *post*.

34a. *Brake v. Collison* (C. C. A.), 11 Am. B. R. 797, 129 Fed. 201.



more than he pays another.<sup>34b</sup> The judicial definition of preference<sup>35</sup> is not controlling in this connection, for a preference which will be an act of bankruptcy is something other and more than one voidable under § 60-b. Thus, the intent to prefer on the part of the debtor may not be accompanied by reasonable cause to believe on the part of the creditor.<sup>36</sup> The elements of preference under this subsection are: (1) insolvency, (2) intent to prefer, and (3) a transfer of property.<sup>37</sup>

*Insolvency.*—Compare discussion under § 1(15). For burden of proof under this subsection, see under § 3-d, *post*.

*Intent to Prefer.*—This will be presumed when the transaction consists in a transfer of personal property by way of payment.<sup>38</sup> The question of intent is one for the jury.<sup>39</sup> Doctrines held under the former law are summarized in the foot-note.<sup>40</sup> It is possible that, under the new definition of insolvency, one may not always know the fair valuation of his property, and, therefore, may not be able to show that he knew whether he was solvent or not. But the presumption is not so much one of actual knowledge as that a person is chargeable with knowledge of his financial condition.

*Alleging and Proving Intent.*—The precedents here are also summarized in the foot-note.<sup>41</sup>

34b. See *Rex Buggy Co. v. Hearick*, 12 Am. B. R. 726.

35. Note *In re Wright Lumber Co.*, 8 Am. B. R. 345, 114 Fed. 1011. See also Sections One and Sixty of this work.

36. See *Crooks v. The People's Nat. Bank*, 3 Am. B. R. 238, 46 App. Div. (N. Y.) 335; *In re Wright Lumber Co.*, *supra*.

37. As to what evidence will establish this act of bankruptcy, see *Goldman v. Smith*, 1 Am. B. R. 266. For analysis of the subsection, see *In re Rome Planing Mills*, 3 Am. B. R. 123, 96 Fed. 812.

38. *Johnson v. Wald*, 2 Am. B. R. 84, 93 Fed. 640; *In re Rome Planing Mills*, *supra*; *In re Gilbert*, 8 Am. B. R. 101, 112 Fed. 951. For admirable discussion of "intent" see *Githens, etc., Co. v. Schiffer Bros.*, 7 Am. B. R. 453, 112 Fed. 505.

39. *In re Bloch*, 6 Am. B. R. 300, 109 Fed. 790.

40. As one is presumed to know the law, he is presumed to know the

legal results of his acts, and there is a consequent presumption that he intends the legal results of those acts (*Traders' Bank v. Campbell*, 14 Wall. 87). One intends the legal consequences which would naturally follow (*In re Dibblee*, Fed. Cas. 3,884; to the same effect, *In re McGee*, 5 Am. B. R. 262, 105 Fed. 895). Therefore, payments by one knowing himself to be insolvent raise a conclusive presumption of intent to prefer (*Driggs v. Moore*, Fed. Cas. 4,083; *Rison v. Knapp*, Fed. Cas. 11,861). A debtor is presumed to know his financial condition and, if in fact insolvent, the burden is on him to establish his want of knowledge (*In re Silverman*, Fed. Cas. 12,855); but, if he honestly believed himself solvent, the burden shifts from him to the creditors (*Toof v. Martin*, 13 Wall. 40). These cases are probably still controlling.

41. The specific fact as to the preference relied on must be alleged, with time, place, person, and circum-

*Intent, as Distinguished from Motive.*—There must be design to give an advantage. Where the transfer is in pursuance of an effort to extricate the transferrer from his embarrassments, it will not be held a preference.<sup>42</sup> Likewise, where the physical transfer is in pursuance of a valid contract antedating the bankruptcy.<sup>43</sup> But a transfer is not the less a preference because given in answer to a request or in fulfillment of a prior promise made at the time of contracting the debt.<sup>44</sup> Evidence of a failure to record a mortgage until several months after its execution may justify a finding that it was given with an intent to prefer.<sup>44a</sup>

*Transfer of Property.*—"Transfer" here has the enlarged meaning given it by § 1 (25). It is immaterial how the transfer is made. Suggestive cases will be found in the foot-note.<sup>45</sup>

stance (In re Nelson, 1 Am. B. R. 63, 98 Fed. 76; Griffin Pants Factory v. Nelms, etc., 2 N. B. N. 630, is in this connection doubtful authority); an omission of the specific date of the transfer does not render the petition demurrable (In re Vastbinder, 11 Am. B. R. 118, 126 Fed. 417), and where the debtor had knowledge of his insolvent condition, an intent to prefer will be conclusively presumed (In re Gilbert, ante). Cases under the former law held the following: Any fact which tends to establish the existence or nonexistence of intent is admissible evidence (Linkman v. Wilcox, Fed. Cas. 8,374; Giddings v. Dodds, Fed. Cas. 5,405). The testimony of the party himself is entitled to little weight (Oxford Iron Co. v. Slafter, Fed. Cas. 10,637). Transfers of one's property afford a violent, almost conclusive, presumption of intent to prefer, if there are creditors unprovided for (In re Waite, Fed. Cas. 17,044). Proof of an antecedent indebtedness is, in general, necessary to establish that a payment or security is a preferential transfer (Clark v. Iselin, 21 Wall. 360; Burnhisel v. Firman, 22 Wall. 170; Sawyer v. Turpin, 91 U. S. 114). But where the proof is that the property was transferred to a mortgagee who was a creditor in an amount larger than the value of the property transferred, the presumption of intent to prefer will be negated (Living-

ston v. Bruce, Fed. Cas. 8,410; Catlin v. Hoffman, Fed. Cas. 2,521).

<sup>42</sup>. In re Wolf, 3 Am. B. R. 555, 98 Fed. 84.

<sup>43</sup>. Sabin v. Camp, 3 Am. B. R. 578, 98 Fed. 974. For analogous cases under the law of 1867, see Winter v. Railway Co., Fed. Cas. 17,890; In re Hapgood, Fed. Cas. 6,044.

<sup>44</sup>. Arnold v. Maynard, Fed. Cas. 561; and for additional cases, see Collier on Bankruptcy, 1st, 2d, and 3d editions, sub nom. "Intent to be Distinguished from Motive."

<sup>44a</sup>. In re Edelman (C. C. A.), 12 Am. B. R. 238, 130 Fed. 700.

<sup>45</sup>. Thus when the transfer was partly in consideration of the payment of checks which amounted to an overdraft, but were guaranteed to the bank by the transferee (Goldman v. Smith, 1 Am. B. R. 266, 93 Fed. 182); and when it was to the administratrix of a creditor's estate but in her individual capacity, and she then borrowed money thereon and gave it to the husband of the debtor to pay a debt on which he and the estate were liable (In re McGee, 5 Am. B. R. 262, 105 Fed. 895); so also, of a transfer of firm property by one partner to the other to give individual creditors a preference (Collins v. Hood, Fed. Cas. 3,015); and where an insolvent transfers his property to another who executes a mortgage thereon in favor of a creditor (Gilson v. Dobie, Fed. Cas. 5,394); it includes a chattel

## § 3a (3).]

## Preference through Legal Proceedings.

*Cross References.*—For burden of proof of insolvency, see § 3-d. For voidable preferences, see § 60-b. For preferential liens through legal proceedings, see § 67-c (1).

**Subs. a (3). Third Act of Bankruptcy; Preference through Legal Proceedings.**—This has been well termed the passive act of bankruptcy. It differs from the corresponding act in the law of 1867, in that intent is not material. It is in harmony with § 67-f, under which liens through legal proceedings are void, irrespective of intent on the part of the debtor, or pressure, due to knowledge, on the part of the creditor. The nearest approximation to it is found in the Canadian Insolvency Act of 1869 (now repealed).<sup>46</sup> The corresponding clause in the English Bankruptcy Act is also of interest.<sup>47</sup> The Torrey bill in its last form,<sup>48</sup> and the Henderson substitute, contained words which seemed to include these two foreign provisions. The exact phrasing of the present law did not appear until the bill had been agreed to in conference committee. Changes narrowing its scope were then made. In spite of them, it is the most virile and available of the acts of bankruptcy.

*Comparison with the Act of 1867.*—Section 39 of that act provided that an insolvent who should "procure or suffer his property to be taken on legal proceedings, with intent to give a preference to one or more of his creditors" thereby committed an act of bankruptcy; and, by § 35, it was provided that any attachment or seizure under execution of a person's property "procured by him" with a view to give a preference, should be void. The doubt which long divided the lower courts as to the meaning of these clauses

mortgage given within the four months period (*Matter of Riggs Restaurant Co.* (C. C. A.), 11 Am. B. R. 508, 130 Fed. 691). As to assignment of money due to alleged bankrupt to an indorser on his note, see *In re O'Donnell*, 12 Am. B. R. 621. As to transfer of accounts in lieu of materials pledged, see *Anniston Supply Co. v. Anniston Rolling Mills*, 11 Am. B. R. 200, 125 Fed. 974. For an alleged concealment held a transfer, see *Citizens' Bank v. De Pauw Co.*, 5 Am. B. R. 345, 105 Fed. 926. For a clear case, see *Boyd v. Lemon-Gale Co.*, 8 Am. B. R. 81, 114 Fed. 647.

<sup>46.</sup> § 13. A debtor shall be deemed insolvent, and his estate shall become subject to compulsory liquidation if

he permits any execution issued against him under which any of his chattels, land, or property are seized, levied upon, or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or officer for the sale thereof, or for fifteen days after such seizure.

<sup>47.</sup> Act of 1890, § 1. A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the high court, and the goods have been either sold or held by the sheriff for twenty-one days.

<sup>48.</sup> S. 1035, introduced by Senator Lindsay, March 23, 1897.

was finally settled in *Wilson v. City Bank*,<sup>49</sup> wherein the Supreme Court held that no intent could be inferred from the mere neglect of the alleged bankrupt, properly sued on a just claim, to interpose an answer when there was no valid defense; and, therefore, that that intent which was an essential element of this act of bankruptcy could not be predicated on mere passive nonresistance. This case has been the storm-center of the decisions on the subsection now under consideration. The earlier and most of the later cases held that intent had been dropped out here and elsewhere in the statute and that result — the inequity flowing from the transaction, rather than the animus of it — had been substituted instead.<sup>50</sup> Two decisions, however, held to the older doctrine, that mere passivity was not enough.<sup>51</sup> The former case seems to have been decided without the difference between the statutes being noted; the latter is of great ability and for a time substituted doubt for what had grown to be certainty. The question reached the Supreme Court late in 1901, and was then settled by a five-to-four decision in *Wilson Bros. v. Nelson*,<sup>52</sup> which, reversing the court below, upholds the majority of the previous cases, and finally determines that intent is not an element of pleading or proof where the third act of bankruptcy is relied on.<sup>52a</sup> In other words, it is now the settled law that an insolvent may be thrown into bankruptcy by the requisite number of his creditors, if a judgment has been entered against him, execution issued and levy made, and sale five or less days away, irrespective of whether he procured or merely could not prevent the judgment against him. This, from the creditor's standpoint, is the high-water mark of Anglo-Saxon "acts of bankruptcy."<sup>52b</sup>

*Meaning of Words.*—"Five days before a sale" has been held to mean the same as "five days before the day set for the sale."<sup>53</sup> This enlargement of meaning would seem essential to carry out the

49. 17 Wall. 473.

50. In re Meyers, 1 Am. B. R. 1; In re Reichman, 1 Am. B. R. 17, 91 Fed. 624; In re Moyer, 1 Am. B. R. 577, 97 Fed. 324; In re Rome Planing Mills, 3 Am. B. R. 123, 96 Fed. 812; In re Thomas, 4 Am. B. R. 571, 103 Fed. 272; In re Miller, 5 Am. B. R. 140, 104 Fed. 764; In re Harper, 5 Am. B. R. 567, 105 Fed. 900.

51. In re Nelson, 1 Am. B. R. 63, 98 Fed. 76; Duncan v. Landis, 5 Am. B. R. 649.

52. 183 U. S. 191, 7 Am. B. R. 142.

52a. Bradley Timber Co. v. White, 10 Am. B. R. 329, 121 Fed. 779, 58 C. C. A. 55, affirming, 9 Am. B. R. 441.

52b. See further discussion of this subject by Referee Hotchiss in Matter of Rung Furniture Co., 10 Am. B. R. 44, in which the cases interpreting § 3-a (3) are collated.

53. In re Meyers, 1 Am. B. R. 1; In re Elmira Steel Co., 5 Am. B. R. 484. And compare Re North (1895), 2 Q. B. 264.

clear intent of the act; if a petition could not be filed until after the actual sale, creditors would often be remediless. "Insolvent" means what it is defined to mean in § 1 (15). "Preference" refers merely to a resultant inequality between creditors of the same class.<sup>54</sup> "Legal proceedings" means proceedings in a court to assert a legal remedy or obtain an equitable relief.<sup>55</sup> A distraint of goods under a landlord's warrant is not "a legal proceeding" under this clause.<sup>55a</sup> "Suffered or permitted" includes passive nonresistance as well as nonability to resist.<sup>56</sup> A debtor who does not pay a lawful debt when due, and stands by while his creditor secures a judgment against him, and levies upon his property, "suffers and permits" such judgment to be taken, and such levy to be made, and commits an act of bankruptcy under this clause.<sup>56a</sup> "Creditor" is defined in § 1 (9).

*Subsection Somewhat Liberally Construed.*—The courts have interpreted this subdivision broadly. A payment of money to a sheriff by a debtor of the judgment debtor against whom an execution has been issued is a technical levy and available as an act of bankruptcy.<sup>57</sup> So also is garnishee process after execution unsatisfied.<sup>58</sup> So also is failure to pay matured judgment notes followed by entry of judgment and execution issued.<sup>59</sup> Though the judgment is more than four months old, the levy, if within that period, followed by a sale, is an act of bankruptcy.<sup>60</sup> But a mere entry of judgment without the issue of an execution is not.<sup>61</sup> The enforcement of a lien of a judgment obtained prior to the enactment of the bankruptcy act by the issue of an execution is not a preference and the provisions of § 3-a (3) do not apply.<sup>61a</sup> A failure to vacate a livery-stable keeper's lien is not an act of bankruptcy under such subdivision,<sup>61b</sup>

54. § 60-a.

55. Compare *In re Emslie*, 4 Am. B. R. 126, 102 Fed. 291, reversing 3 Am. B. R. 282, 97 Fed. 929.

55a. *In re Belknap*, 12 Am. B. R. 326, 129 Fed. 646.

56. *In re Gallagher*, 6 Am. B. R. 255.

56a. *Bogen & Trummel v. Potter* (C. C. A.), 12 Am. B. R. 288, 129 Fed. 533.

57. *In re Miller*, 5 Am. B. R. 140, 104 Fed. 764.

58. *In re Harper*, 5 Am. B. R. 567, 105 Fed. 900.

59. *In re Thomas*, 4 Am. B. R. 571, 103 Fed. 272.

60. *In re Ferguson*, 2 Am. B. R. 586, 95 Fed. 429.

61. *In re Anderson*, 2 N. B. N. Rep. 1000. Compare also, on the general subject, *In re Chapman*, 3 Am. B. R. 607, 99 Fed. 395, and *Parmenter Mfg. Co. v. Stoevers*, 3 Am. B. R. 220, 97 Fed. 330.

61a. *Owen v. Brown*, 9 Am. B. R. 717, 120 Fed. 812, 57 C. C. A. 180.

61b. *In re Mero*, 12 Am. B. R. 171, 128 Fed. 630.

and it has been held that a mechanic's lien is not a lien obtained through legal proceedings.<sup>61c</sup>

**Subs. a (4). Fourth Act of Bankruptcy; a General Assignment or Receivership.**—The making of a general assignment for the benefit of creditors, with or without preferences, has been an act of bankruptcy for over one hundred years.<sup>62</sup> Though not so in words under the law of 1867, late in the history of that statute it was quite generally held that, being a palpable fraud on the law, it was an act of bankruptcy.<sup>63</sup> While, under the decisions, there would seem little doubt that a general assignment is an act of bankruptcy, because intended to hinder or delay creditors,<sup>64</sup> this new clause, § 3-a (4), removes all question and is an affirmative declaration of great importance to the system. Such an assignment, and whether of a person or copartnership, or of one of that class of corporations mentioned in § 4-b, even though without preferences, is now, if made within four months of the filing of the petition, a constructive fraud on the act,<sup>65</sup> and, in itself, without either insolvency or intent, an available act of bankruptcy.<sup>66</sup> This does not mean that general assignments are no longer lawful; rather, that the assignor and his counsel thereby set the door of the court of bankruptcy ajar to such creditors as may choose to bid them enter.<sup>66a</sup> The question is one more for the conscience of the counsel than for the court.

*What is a General Assignment.*—The following assignments have been held acts of bankruptcy: A general assignment for the benefit of creditors, under a statute regulating this common-law right;<sup>67</sup> a general assignment by a corporation made by direction of a majority of the directors and stockholders,<sup>68</sup> a confession of

61c. In re Emslie, 4 Am. B. R. 426, 102 Fed. 292.

62. Compare Jones v. Sleeper, Fed. Cas. 7,496.

63. Compare Globe Ins. Co. v. Cleveland Ins. Co., Fed. Cas. 5,486; Platt v. Preston, Fed. Cas. 11,219; In re Kasson, Fed. Cas. 7,617; In re Mendelsohn, Fed. Cas. 9,420; MacDonald v. Moore, Fed. Cas. 8,763.

64. § 3-a (1).

65. In re Gutwillig, 1 Am. B. R. 388, 92 Fed. 337; In re Gray, 3 Am. B. R. 647, 47 App. Div. (N. Y.) 554.

66. West Co. v. Lea Bros., 2 Am. B. R. 463, 174 U. S. 594; Day v. Beck, etc., Co., 8 Am. B. R. 175, 114 Fed. 834.

66a. See In re Chase, 10 Am. B. R. 677, 124 Fed. 753, 59 C. C. A. 629, in which it was held that a general common-law assignment for the benefit of creditors, directing an equal distribution among them, without any attempt to defraud or embarrass persons to whom the assignor is under liability, is not contrary to the policy of the bankruptcy law.

67. In re Gutwillig, 1 Am. B. R. 78, 90 Fed. 425; In re Sievers, 1 Am. B. R. 117, 91 Fed. 366, both of which cases were later affirmed.

68. Clark v. Am. Manf. & Enameling Co., 4 Am. B. R. 351, 101 Fed. 962.

§ 3a (4).] What is not General Assignment; Act of 1903.

judgment to a trustee for the benefit of all creditors.<sup>69</sup> But an assignment may be invalid as to other members of a firm, being executed only by one of them.<sup>70</sup> It is almost elementary that the assignment must be for the benefit of all the creditors; also that neither a bill of sale nor a mortgage is usually a general assignment.<sup>71</sup>

*What is not a General Assignment.*—After *In re Empire Metallic Bedstead Co.*<sup>72</sup> it was long thought to be settled that the voluntary application of an insolvent corporation for a receivership under state laws is not a general assignment, and, therefore, not an act of bankruptcy under § 3-a (4),<sup>73</sup> though there is now persuasive authority that it is under § 3-a (1). It followed that a suit by one partner against the other for an accounting of their insolvent partnership, resulting in the appointment of a receiver, was not an act of bankruptcy under this subsection.<sup>74</sup> A direct transfer to creditors, after the intervention of a trustee duly appointed, is not an assignment for the benefit of creditors.<sup>74a</sup>

*Amendment of 1903.*—By the Act of 1903, the so-called equivalence referred to in the foot-notes to the last paragraph has become the law. Now, a copartnership or a corporation<sup>75</sup> which is insolvent and applies for or, because of insolvency,<sup>75a</sup> has been put in charge of a receiver or trustee, under the laws of a State, or of a Territory, or of the United States, thereby commits an act of bankruptcy. This amendment was intended to place all copartnerships and such corporations as may be adjudged involuntary bankrupts<sup>76</sup>

69. *In re Green & Rogers*, 5 Am. B. R. 848.

70. *Chemical Nat. Bank v. Meyer*, 1 Am. B. R. 565, 98 Fed. 976, affirmed in 3 Am. B. R. 559, 98 Fed. 976.

71. It may be doubted, however, whether *Rumsey v. Novelty, etc., Co.* (3 Am. B. R. 704 and foot-note, 99 Fed. 699), is safe authority in holding that the deed of trust there given was not a general assignment.

72. 3 Am. B. R. 575, 98 Fed. 981.

73. Compare *In re Baker-Ricketson Co.*, 4 Am. B. R. 605, 97 Fed. 489; *Vaccaro v. The Security Bank*, 4 Am. B. R. 474, 103 Fed. 436; *Davis v. Stevens*, 104 Fed. 235; *In re Gilbert*, 8 Am. B. R. 101, 112 Fed. 951. But see also, as suggesting the doctrine of equivalence, *In re Harper*, 3 Am. B. R. 804, 100 Fed. 266; *In re Macon Sash, etc., Co.*, 7 Am. B. R.

66, 112 Fed. 323, this case, however, reversed as *Carling v. Seymour Lumber Co.*, 8 Am. B. R. 29, 113 Fed. 483; *Scheuer v. Smith*, 7 Am. B. R. 384, 112 Fed. 407; *In re Empire Metallic Bedstead Co.*, 3 Am. B. R. 575, 98 Fed. 581.

74. But see *Mather v. Coe*, 1 Am. B. R. 504, 92 Fed. 333. Compare also *In re Storm*, 4 Am. B. R. 601, 103 Fed. 618, and *In re Storck Lumber Co.*, 8 Am. B. R. 86, 114 Fed. 860. See cases cited in foot-note 27, ante.

74a. *Anniston Iron, etc., Co. v. Anniston Rolling Mill Co.*, 11 Am. B. R. 200, 125 Fed. 974.

75. See § 1 (19).

75a. As to necessity of insolvency, see *In re Douglas Coal, etc., Co.*, 12 Am. B. R. 539, 131 Fed. 769.

76. § 4-b. See *Lowenstein v. McShane Mfg. Co.*, 12 Am. B. R. 601.

on the same footing as individual insolvents who attempt an equivalent fraud on the act.<sup>77</sup> The amendment of 1903 is not retroactive, and a petition filed after such amendment took effect alleging the appointment of a receiver for an insolvent corporation within the four months period, but prior to the passage of the amendment, must be dismissed; the fact that the receivership continues after the taking effect of the amendment, is not of itself sufficient to create an act of bankruptcy.<sup>77a</sup> Since the passage of the amendment a state court cannot by appointing a receiver of an insolvent debtor obtain priority of jurisdiction to administer the assets of such debtor.<sup>77b</sup> It is immaterial, however, that a proceeding for the dissolution of a corporation was instituted prior to the taking effect of the amendment, if the application for an order appointing a permanent receiver in such proceedings was made subsequent to such amendment.<sup>77c</sup>

*Meaning of Words.*—"Insolvent" has the same meaning here as elsewhere in the statute.<sup>78</sup> The amendment thus makes insolvency

**77.** Some of the reasons for the change have been stated thus:

(1) It is one of the general purposes of the bankruptcy law to provide a uniform national law by which insolvent traders can make a pro rata distribution of their assets among creditors, and there is no reason apparent why trading corporations as well as trading copartnerships should not be permitted to avail themselves of this statute.

(2) In the more important commercial States, small corporations, with their limited liability, have practically superseded partnerships. As the law now stands, short of the commission of an act of bankruptcy, these corporations must wind up their affairs under the procedure of the State which created them, a procedure which is everywhere less favorable to creditors.

(3) Owing to the lack of comity between the States, a receiver of an insolvent corporation in one State is rarely recognized in another, with the result that the creditors in that other State, by garnishee process or otherwise, may, unless the corporation

commits an act of bankruptcy, secure preferences.

(4) If a corporation seeks to wind up its affairs and distribute its assets by means of a receivership, such a proceeding does not constitute an act of bankruptcy, and, consequently, creditors are entirely deprived of the valuable rights and safeguards provided by the bankruptcy law.

(5) As the law now stands, a corporation which wishes to be administered in bankruptcy is compelled to go through the motions of committing an act of bankruptcy that involuntary bankruptcy may be alleged against it, and it be brought into court apparently against its will. This circumlocution is bad in principle and worse in practice.

(Report of Ex. Com. of Nat. Assn. of Referees in Bankruptcy, of March, 1900.)

**77a.** *Seaboard Steel Casting Co. v. Trigg Co.*, 10 Am. B. R. 594, 124 Fed. 75.

**77b.** *In re Knight*, 11 Am. B. R. 1, 125 Fed. 35.

**77c.** *Matter of Milbury Co.*, 11 Am. B. R. 523.

**78.** See § 1 (15).



an essential element of proof in receivership cases.<sup>79</sup> "Applied for" manifestly means the voluntary application of the copartnership or of a corporation under resolution of its board of directors or other governing body, as regulated or prescribed by the state law of which the corporation is the creature. "Been put in charge of" clearly indicates every other means of securing the appointment of a receiver, as when the State or a creditor proceeds against the corporation for its dissolution. "Trustee," of course, means much the same as "receiver;" the nomenclature is different in different States. The intention of this amendment being clear, there would appear little doubt that any act, procedure, or process for the winding up of insolvent corporations or copartnerships, which substantially abridges or deprives creditors of the right to a trustee of their own choosing, or of the greater right to compel prorating between all creditors of the same class, or any other right given them by the bankruptcy law, will, provided the alleged bankrupt is insolvent at the time of the commission of the act complained of and that act be within the four months period, amount to an act of bankruptcy. The importance of this change cannot be overestimated. For the time when it went into effect, see "Supplemental Section to Amendatory Act," *post*.

*Precedents.*—The law of 1867 applied to "all moneyed, business, or commercial corporations and joint-stock companies." This section also provided that "upon the petition of any creditor of such corporation or company, the like proceedings shall be had and taken as are provided in the case of debtors." But the corresponding acts of bankruptcy under the former law,<sup>80</sup> are not sufficiently analogous to furnish reliable precedents; in each the element of intent was essential. A voluntary receivership of a corporation may, of course, amount to "a transfer to his (its) creditors;" so may it also be "a transfer of money or other property," or "the procuring of its property to be taken on legal process," each with intent to prefer; or "with the intent by such disposition of his (its) property to defeat or delay the operation of the act." But now, not even the result, much less the intent, is the essential test. The mere fact of the appointment of a receiver or trustee, nay, even a mere application for such an appointment, coupled with in-

<sup>79</sup>. As to burden of proof, see *is a Receivership,* *post*, in this Section of this work.

<sup>80</sup>. § 39, R. S., § 5021.

solvency, is enough. However, it was held under the law of 1867, that the appointment by a state court of a receiver of a corporation is "a taking on legal process,"<sup>81</sup> and the fact that the corporation was extinct, it having been dissolved by the state law, was held not a bar to the proceeding in bankruptcy, or to oust the Federal court of jurisdiction.<sup>82</sup>

*Reference to Other Sections.*— Useful references to other sections will be found in the foot-note.<sup>83</sup>

### **Subs. a (5). Fifth Act of Bankruptcy; a Confession of Bankruptcy.**

— The Ray bill in the House provided for the voluntary bankruptcy of corporations; the Senate, however, struck the provision out. Hence the act of bankruptcy now to be discussed still continues of importance. It is not to be expected that in his correspondence a debtor who is a natural person will, with a purpose to get into bankruptcy, both confess inability to pay his debts and willingness to be adjudged a bankrupt; the filing of a voluntary petition is more direct. Indeed, the value of this act of bankruptcy did not appear until the doctrine that corporations might through it become in effect voluntary bankrupts was generally recognized.<sup>84</sup> Three things seem to be necessary to this act: (1) a writing signed by the debtor or some officer or agent duly authorized; (2) a distinct admission therein of his inability to pay his debts; and (3) an unqualified expression of willingness to be adjudged a bankrupt on that ground. Thus, where the officer of a corporation was deputized to execute such a writing, provided a petition should be filed against it, this is not an act of bankruptcy.<sup>85</sup> It is sufficient in legal effect if the board of directors of a corporation who were charged with the conduct of its business, declare the inability of the corporation to pay its debts, and its willingness to be adjudged a bankrupt, in accordance with the legal requirements specified.<sup>85a</sup> While a writing in the exact

81. *In re Merchants' Ins. Co.*, Fed. Cas. 9,441.

82. *Thornhill v. Bank of Louisiana*, Fed. Cas. 13,992, affirming s. c., Fed. Cas. 13,990.

83. For estoppel where the creditors have assented to the assignment, and later seek to petition the assignor into bankruptcy, see § 59-b. For stays on assignment proceedings in the state courts, see §§ 2 (15) and 11-a. For jurisdiction of the court of bankruptcy over the assigned estate, both before and after adjudication, see

§§ 2 (3) (15), 3-e, 23, and 69-a. For effect of adjudication on title transferred by a general assignment, see § 70-a.

84. *In re Marine Machine Co.*, 1 Am. B. R. 421, 100 Fed. 439; *In re Kelly Dry Goods Co.*, 4 Am. B. R. 528, 102 Fed. 747. Contra, *In re Bates Machine Co.*, 1 Am. B. R. 129, 91 Fed. 625.

85. *In re Baker-Ricketson Co.*, 4 Am. B. R. 605, 97 Fed. 489.

85a. *In re Moench & Sons Co.*, 10 Am. B. R. 656, 123 Fed. 965, in which

§ 3b.]

Against whom Petition Filed.

words of the statute, if authoritatively signed,<sup>86</sup> is surely sufficient; yet it would seem that any writing which substantially covers the three essentials just stated will be enough.<sup>86a</sup> Suggestive cases will be found in the foot-note.<sup>87</sup>

### III. Subs. b. AGAINST WHOM PETITION MAY BE FILED.

**An Insolvent Who has Committed an Act of Bankruptcy.**—"Person" in this subsection includes a corporation,<sup>88</sup> officers, partnerships, and women,<sup>89</sup> but does not include wage-earners or a person engaged chiefly in farming or the tillage of the soil.<sup>90</sup> "Insolvent" means what it always does in this statute. Here, also, it means something more, *i. e.*, insolvency at the time of the filing of the petition, and, if the act of bankruptcy is one which can be committed only by an insolvent, at the time of the commission of such act. In most cases, insolvency at both times must, therefore, be distinctly alleged.<sup>91</sup>

**Within Four Months of the Act Relied On.**—In computing, the day of filing is excluded and the last day included.<sup>92</sup> If the last day is a Sunday or a "holiday,"<sup>93</sup> the time does not expire until the next

case it was also held that petitioning creditors are not estopped from alleging a resolution adopted by a board of directors as an act of bankruptcy, on the ground of collusion, charged by an answering creditor, who would obtain a preference by attachment if the petition were dismissed. This case was affirmed in 12 Am. B. R. 240, 130 Fed. 685.

86. In *re Mutual Mercantile Agency*, 6 Am. B. R. 607, 111 Fed. 152.

86a. In the case of *Brinkley v. Smithwick*, 11 Am. B. R. 500, 126 Fed. 686, it was held that an insolvent debtor's willingness to be adjudged bankrupt on the ground of insolvency may be inferred from the admission of insolvency in his answer to an involuntary petition. But in the case of *In re Wilmington Hosiery Co.*, 9 Am. B. R. 579, 120 Fed. 179, it was held that an admission of insolvency by a corporation in its answer to a bill filed against it praying for the appointment of a receiver is not an admission in writing of its inability to pay its debts and its willingness to be adjudged a bankrupt on

that ground, within the meaning of clause 5 of section 3-a.

87. In *re Kersten*, 6 Am. B. R. 516, 110 Fed. 929; In *re Rollins Gold & Silver Mining Co.*, 4 Am. B. R. 327, 102 Fed. 982. Compare, on the general subject, § 4-1 (f) of the English Act of 1883, which provides that a person commits an act of bankruptcy "if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;" the latter half of the clause seems to be the initial step of what we would call a voluntary proceeding; the former half lacks one of the three elements of our § 3-a (5).

88. But only those indicated in § 4-b.

89. See § 1 (19).

90. § 4-b. For persons by whom a creditor's petition may be filed, see under Section Fifty-nine.

91. See under Section One, ante.

92. In *re Dupree*, 97 Fed. 28; *Whitley Grocery Co. v. Roach*, 8 Am. B. R. 505, and foot-note.

93. § 1 (14).

day;<sup>94</sup> and days will not be split into hours.<sup>95</sup> For cases on the meaning of "within four months," when applied to transactions other than acts of bankruptcy, see under Sections Sixty, Sixty-seven, and Seventy.

**Necessity for Record or Possession to Start Time Running.**—The last sentence of subsection b has as yet had little attention from the courts. A fair statement of its meaning is: a petition cannot be filed more than four months after the recording of the instrument constituting the alleged act of bankruptcy where recording is required or permitted, or, where it is not, more than the same statutory period after the beneficiary takes notorious, exclusive, *and* continuous possession of the property transferred; provided always that prior actual notice shall set the time running in either case. The last four lines, *i. e.*, after the word "required," of the subsection do not recur in the like sentence added to § 60-b by the amendatory act of 1903;<sup>96</sup> doubtless the common rule as to actual notice will be read into it by the courts. Their purpose here is clear. Further they seem to make necessary the substitution of "and" for "or" in the phrase "notorious, exclusive, or continuous;"<sup>97</sup> for, if with notice, every possession must be "notorious," and if that alone and not also a possession that is "exclusive and continuous" were enough to start the time running, the clause as to actual notice would become tautological. The manifest purpose of the subsection is to prevent the escape of alleged bankrupts who have committed but concealed acts of bankruptcy more than four months old.

#### IV. Subs. c. SOLVENCY AND THE FIRST ACT OF BANKRUPTCY.

**Burden on the Alleged Bankrupt.**—This subsection has reference only to the first act of bankruptcy and to solvency at the time of filing the petition. It is conceivable that a debtor may have been insolvent at the time of the act of bankruptcy, but not when the petition is filed. Insolvency, other than as evidence of intent, being

94. *Dutcher v. Wright*, 94 U. S. 533; *In re Stevenson*, 2 Am. B. R. 66, 94 Fed. 111; *In re Edelstein*, 1 N. B. N. 168; *Parmenter Mfg. Co. v. Stoeper*, 3 Am. B. R. 220, 97 Fed. 330.  
95. Compare *In re Tonawanda St. Planing Mill Co.*, 6 Am. B. R. 38. Also see under Section Thirty-one of this work.

96. For reason for the amendment,

see *In re Mersman*, 7 Am. B. R. 46, and § 60-b as amended by Act of 1903.

97. For the meaning of "notorious, exclusive, or continuous possession," see *In re Woodward*, 2 Am. B. R. 233, though this case construes § 3-b as though it were a part of § 60-b before the amendments of 1903. See also *In re Mingo Valley Creamery Assn.*, 100 Fed. 282.

§ 3d.] Solvency; Second and Third Acts of Bankruptcy.

unimportant where the act of bankruptcy consists of hindering, delaying, or defrauding creditors, it was both proper and scientific to insert this subsection.<sup>97a</sup> It seems, therefore, that, where this act of bankruptcy is relied on, it is not necessary that the petitioning creditors either allege or prove insolvency at either period.<sup>98</sup> On the other hand, it is clear that proof of solvency by the debtor at the time the petition is filed is a complete defense. Solvency may be pleaded by a responding creditor as well as by the alleged bankrupt.<sup>99</sup>

V. Subs. d. SOLVENCY AND THE SECOND AND THIRD ACTS OF BANKRUPTCY.

**Bankrupt must Produce Books and Submit to Examination.**— This subsection clearly has reference to the second and third acts of bankruptcy only. Both are constructive or legal frauds. As to neither, therefore, is the burden properly on the party having the affirmative. The alleged bankrupt must appear, with his books, papers, and accounts and submit to an examination as to all matters tending to establish solvency or insolvency; if he fails so to do, the burden is on him.<sup>100</sup> The books, papers, and accounts referred to are those material in determining an alleged bankrupt's financial condition.<sup>100a</sup> The books of the alleged bankrupt are competent, but not conclusive evidence on the question of insolvency.<sup>100b</sup> Few cases have arisen where the meaning of this subsection has been in question.<sup>101</sup> In shady failures, it results in the alleged bankrupt being silent on the question of insolvency, thus eliminating it from the case at the outset. When the bankrupt does put solvency at issue and appears and gives testimony, the burden at once shifts to the petitioning creditors.<sup>101a</sup>

97a. In re Pease, 12 Am. B. R. 66, 129 Fed. 446.

98. In re West, 1 Am. B. R. 261; s. c., West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

99. In re West, supra.

100. See In re Taylor, 4 Am. B. R. 515, 102 Fed. 728; In re Coddington, 9 Am. B. R. 243, 126 Fed. 891; Bogen & Trummell v. Protter (C. C. A.), 12 Am. B. R. 288, 129 Fed. 533.

100a. Bogen & Trummell v. Protter (C. C. A.), 12 Am. B. R. 288, 129 Fed. 533.

100b. In re Docker-Foster Co., 10 Am. B. R. 584, 123 Fed. 190.

101. The following will be found of some value: Lea Bros. v. West Co., 1 Am. B. R. 261, 91 Fed. 237; s. c. on appeal, supra; Bray v. Cobb, 1 Am. B. R. 153, 91 Fed. 102; In re Rome Planing Mills, 3 Am. B. R. 766, 99 Fed. 137.

101a. Bogen & Trummell v. Protter (C. C. A.), 12 Am. B. R. 288, 129 Fed. 533.

**Solvency where the Act of Bankruptcy is a Receivership under § 3-a (4).**— Here, perhaps, because the existence of a receivership usually implies insolvency, or perhaps because the papers on which it is granted were thought the equivalent of the books and examination called for by § 3-d, the usual rule, putting the burden on him who asserts insolvency, was not changed. This new act of bankruptcy being in the fourth subdivision of § 3-a, subsections c and d do not apply. Thus, it would seem necessary for petitioning creditors relying on this act of bankruptcy to allege and prove insolvency both at the time of filing and at the time of the commission of the act relied on.

#### VI. Subs. e. BOND ON TAKING POSSESSION OF BANKRUPT'S PROPERTY BEFORE ADJUDICATION.

**Bond.**— As has been noted, this requirement fits into remedies either granted by or implied from § 2.<sup>102</sup> It differs from § 69-a, in that there the authority to issue the warrant should rest upon a showing of neglect by the bankrupt of his property. Here, this subsection has to do only with the bond and the remedies thereunder, and limits the power of seizure that flows from § 2 (3) and (15), by requiring the giving by the petitioning creditors of a bond against the possible dismissal of their proceedings.<sup>103</sup> Under the general statutes, a bond by a single surety company will be sufficient.<sup>104</sup> It should be noted also that, unlike § 69-a, there is here no provision for releasing property seized, on the filing of another bond by the alleged bankrupt. It is presumable, however, that the court, under the broad powers conferred by § 2 (15), could withdraw its officer on receipt of a satisfactory bond or cash indemnity.

**Remedies under.**— The purpose of the bond is to indemnify the alleged bankrupt against "all costs, expenses, and damages occasioned by such seizure, taking, and detention." Costs, as in a suit in equity, are also authorized in all involuntary cases by General Order XXXIV. By the last paragraph of the subsection, if the petition is dismissed or withdrawn, the respondent must be "allowed" such "costs." By the last sentence, the same "shall be

<sup>102.</sup> See §§ 2 (3) and 2 (15), ante.

<sup>103.</sup> For forms, see Forms Nos. 8, 9, and 10.

<sup>104.</sup> See under Section Fifty, post. As to the sufficiency of a surety com-

pany bond not joined in by the applicants, see discussion of Referee Hotchkiss in Matter of Sears, 10 Am. B. R. 389.

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Bond on Taking Possession of Property.

fixed and allowed by the court." Stripped of surplusage, these words undoubtedly mean that the court, in dismissing or on the withdrawal of the petition, may tax counsel fees, costs, expenses, and damages, and thus liquidate the amount of the liability of the obligors.<sup>105</sup> It has been thought that it may also enter judgment on the bond. This is doubtful. The obligors are not parties to the proceeding. Besides, a comparison of this paragraph with that of the Henderson bill<sup>106</sup> shows that a specific grant of power to that end was dropped out ere the bill was passed.<sup>107</sup>

105. *In re Nixon*, 6 Am. B. R. 693, 110 Fed. 633; *Matter of Sears*, 10 Am. B. R. 389; *In re R. H. Williams*, 9 Am. B. R. 736, 120 Fed. 34.

106. Cong. Rec., 55th Cong., 2d Sess., Vol. 31, p. 2039, § 2.

107. *Id.*

## SECTION FOUR.

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### WHO MAY BECOME BANKRUPTS.

**§ 4. Who May Become Bankrupts.**—*a* Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

*b* Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, *mining*,\* or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

*The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.\**

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**Analogous provisions:** In U. S.: *As to voluntary bankruptcy*, Act of 1867, §§ 11, 36, 37; R. S., §§ 5014, 5121, 5122; Act of 1841, §§ 1, 14; *As to involuntary bankruptcy*, Act of 1867, § 39 (as amended by Act of July 27, 1868); R. S., § 5021 (as amended by Acts of June 22, 1874, and July 26, 1876), § 5122; Act of 1841, §§ 1, 14; Act of 1800, §§ 1, 2.

**In Eng.:** Act of 1883, §§ 4 (1), 115.

**Cross references:** **To the law:** Generally to §§ 1 (6) (19); 2 (1); 3; 5; 6; 7; 18; 19; and 59.

**To the General Orders:** Generally to V, VI, VII, VIII, and IX.

**To the Forms:** Nos. 1, 2, 3, 11, 12.

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### SYNOPSIS OF SECTION.

#### **I. Who May Become Bankrupts.**

History and Comparative Legislation.

Amendatory Act of 1903.

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\*Amendments of 1903 in italics.



**II. Persons.****Subs. a. Voluntary Bankruptcy.***Infants.**Lunatics.**Married Women.**Aliens.**Indians.**Estates of Decedents.**Partnerships.***Subs. b. Involuntary Bankruptcy.***Wage-Earners.**Persons Engaged Chiefly in Farming or the Tillage of the Soil.  
Practice.***III. Corporations.****Subs. b. Involuntary Bankruptcy.***Banks.**"Any Unincorporated Company."**"Engaged Chiefly in."**"Manufacturing."**"Trading."**"Printing" and "Publishing."**"Mercantile Pursuits."**"Mining."**Practice.***Effect of the Bankruptcy of Corporations.***Liability of Officers, Directors, or Stockholders.***I. WHO MAY BECOME BANKRUPTS.**

**History and Comparative Legislation.**—Originally, bankruptcy was available to traders only. In most of the Latin countries, it is still limited to those who are "habitually occupied in commercial transactions."<sup>1</sup> This continued to be the law of England until the Act of 1861, though prior to that time a remedy somewhat equivalent was granted to nontraders through numerous Insolvent Debtor Acts. To-day, any English "debtor" may be adjudged a bankrupt.<sup>2</sup> Our first law, being purely involuntary, applied only to "merchants \* \* \* actually using the trade of merchandise, \* \* \* or as a banker, broker, factor, underwriter, or marine insurer"<sup>3</sup>—the

1. See Dunscomb on "Bankruptcy; a Study in Comparative Legislation."

2. Act of 1883, § 4 (1).

3. Act of 1800, § 1.

latter clause a somewhat unscientific extension of the meaning of "trader." The voluntary features of the law of 1841 were available to "all persons owing debts,"<sup>4</sup> and in this it was the exact equivalent of the present law; while the involuntary features were confined to the same persons as the previous statute. Under the Act of 1867, any person "owing debts provable in bankruptcy exceeding \$300"<sup>5</sup> might file a voluntary petition or be thrown into involuntary bankruptcy, the distinction as to traders having, as in England, by this time entirely vanished. Partnerships are, in England, amenable to bankruptcy,<sup>6</sup> but corporations are not. Our first bankruptcy law seems to have been silent as to both commercial entities. The law of 1841 provided for partnership bankruptcies, but not for those of corporations. Our statute of 1867 put partnerships on the same footing as individuals; and as to corporations was much broader than the present law.<sup>7</sup>

**Amendatory Act of 1903.**—The change as to the bankruptcy of corporations is discussed later in this section.<sup>8</sup> The Ray amendatory bill added mining corporations to those liable to involuntary bankruptcy, and permitted those classes of corporations which might be petitioned against, to ask for voluntary bankruptcy, provided their stockholders took certain preliminary steps. It is to be regretted that the bill did not go even further. Corporations are now more general than partnerships, and, even in the smaller communities, are increasing in number and importance; many of them, not being strictly either "trading" or "mercantile" associations, are, without apparent reason, exempted from the operation of this uniform national law. But the Senate amendments struck out even the provisions of the House bill making the voluntary bankruptcy of purely business corporations possible. Thus the only substantial change is the insertion of the word "mining," considered later.

## II. PERSONS.

**Subs. a. Voluntary Bankruptcy.**—Any person who owes debts in any amount, no matter how small, may file a voluntary petition. Such filing is not an act of bankruptcy, as under the law of 1867

<sup>4</sup>. Act of 1841, § 1.

<sup>5</sup>. Act of 1867, § 11; R. S., § 5014. post.

<sup>6</sup>. Act of 1883, § 115.

<sup>7</sup>. See further under subsection b,

<sup>8</sup>. See also under Section Three.

Subs. a.]

Infants; Lunatics.

and the present English law, but is an *ex parte* application that gives jurisdiction to the court to decree it. A voluntary petitioner may even be solvent.<sup>9</sup> But the court is bound to ascertain whether the jurisdictional facts as to residence, that he owes debts, and the like, appear. Only on these grounds can a creditor vacate the adjudication.<sup>10</sup> "Debts" means debts, demands, or claims provable in bankruptcy.<sup>11</sup> Debts not discharged, unless provable, are thus not debts for the purpose here discussed.

*Infants.*—Being persons, it was held under the law of 1841 that they were entitled to the benefits of the act.<sup>12</sup> On the other hand, under the next law, it appears that they were not.<sup>13</sup> This seems to be the rule under the present act.<sup>14</sup> It also seems to be the law in England.<sup>15</sup> An infant, either petitioning or petitioned against, must appear to have capacity to owe. It is yet a mooted question, however, whether an infant who has either held himself out and traded as an adult, or who alleges only debts for necessities, cannot be adjudged bankrupt on his own petition;<sup>16</sup> the better opinion seems to be that he can. It seems settled that when a partnership adjudication is sought and the only defense is that one partner is an infant, the firm and the solvent partner should be declared bankrupts, but the proceeding dismissed as to the infant.<sup>17</sup> Another problem which has arisen in this connection is whether an adjudication can be granted on a copartnership made up of an adult and an infant, without notice to the infant. It seems that no notice is necessary.<sup>18</sup>

*Lunatics.*—A lunatic may not, save in a lucid interval, file a voluntary petition.<sup>19</sup> The English law and practice seem to pro-

9. Compare *In re Fowler*, Fed. Cas. 4,998.

10. *In re Gromme*, 1 Fed. 464; *In re Goodfellow*, Fed. Cas. 5,536; *In re Atlantic Mut. Life Ins. Co.*, Fed. Cas. 628.

11. *In re Yates*, 8 Am. B. R. 69, 114 Fed. 365. Compare §§ 1 (11), 63-a.

12. *In re Book*, Fed. Cas. 1,637.

13. *In re Derby*, Fed. Cas. 3,815.

14. *In re Duguid*, 3 Am. B. R. 794, 100 Fed. 274; *In re Eidemiller*, 5 Am. B. R. 570, 105 Fed. 595.

15. *Ex parte Jones*, 18 Ch. D. 109.

16. Compare *Ex parte Watson*, 16 Ves. 265, and *Ex parte Margett*, *Re Soltykoff* (1891), 1 Q. B. 413, with *In*

*re Brice*, 2 Am. B. R. 197, 93 Fed. 942. See also *In re Pezansky*, 8 Am. B. R. 99.

17. *In re Dunnigan Bros.*, 2 Am. B. R. 628, 95 Fed. 428; *In re Duguid*, *supra*.

18. *In re Duguid*, *supra*. This case follows the analogy of *Lovell v. Beauchamp*, 1 Manson, 467, a leading English case. See also *Belton v. Hodges*, 2 M. & Scott, 496; *Ex parte Moule*, 14 Ves. 602; *Ex parte Adam*, 1 Ves. & B. 494.

19. *Rhodes v. Rhodes*, 44 Ch. D. 94; *In re Marvin*, Fed. Cas. 9,178; *In re Weitzel*, Fed. Cas. 17,365. See *In re Stein* (C. C. A.), 11 Am. B. R. 536, 127 Fed. 547.

vide for intervention by the lunatic's committee, as well as the appointment of a committee *ad litem*; such officer having power to do for the lunatic any act, permitted or required by the bankruptcy law, which the lunatic could have done if sane.<sup>20</sup> This is probably not the law in this country.<sup>21</sup> In voluntary cases it must, therefore, appear that, both at the time of the verification of the petition and of its filing, the petitioner was *compos mentis*. But it is still doubtful in England, and more doubtful here, whether, under any circumstances, a person actually insane can be adjudged a bankrupt.<sup>22</sup> If the proceeding be involuntary, it must at least appear that he was sane at the time of the commission of the act of bankruptcy. The whole question is as yet an open one under the present law. The insanity of a bankrupt after his adjudication does not, however, abate his proceeding.<sup>23</sup>

*Married Women.*—They may become bankrupts in all States where they can contract debts.<sup>24</sup> Where a married woman is liable only in case her separate estate is charged, it must clearly appear that her debts were so charged.<sup>25</sup> Thus far, under the law of 1898, there are no reported cases. Disability to contract has been removed by statute in nearly, if not quite, all the States.

*Aliens.*—Our former acts limited the operation of the law to persons residing within the jurisdiction of the United States.<sup>26</sup> There is no such limitation in the present law.<sup>27</sup> But, if not domiciled or with their principal place of business within the United States, they must have property here. The change made in the former laws by the present act is, therefore, of little practical importance.

*Indians.*—Whether an Indian may become a bankrupt depends on his "owing debts." Until he becomes a citizen, he is subject to certain statutory disabilities against the making of contracts.<sup>28</sup>

20. See *In re Farnham* (1895), 2 Ch. D. 779.

21. *In re Eisenberg*, 8 Am. B. R. 551.

22. *In re Murphy*, Fed. Cas. 9,946; *In re Funk*, 4 Am. B. R. 96, 101 Fed. 244. Contra, *In re Weitzel*, Fed. Cas. 17,365.

23. See Section Eight of this work.

24. Compare *In re Collins*, Fed. Cas. 3,006; *In re Lyons*, Fed. Cas. 8,649; *In re Kinkead*, Fed. Cas. 7,824. See *McDonald v. Tefft-Weller Co.* (C. C. A.), 11 Am. B. R. 800, 128

Fed. 381, holding that under the laws of Florida permitting a married woman to have a separate estate, and to engage in business on her own account, she may be adjudged an involuntary bankrupt.

25. *In re Howland*, Fed. Cas. 6,791; *In re Goodman*, Fed. Cas. 5,540.

26. Compare *In re Goodfellow*, ante.

27. *In re Clisdell*, 2 Am. B. R. 424.

28. R. S., § 2105.

## Subs. a, c.] Estates of Decedents; Involuntary Bankruptcy.

But, aside from this limitation, it seems that he may become either a voluntary or be adjudged an involuntary bankrupt.<sup>29</sup>

*Estates of Decedents.*—By section 125 of the English Act of 1883, the estates of deceased insolvent debtors may be administered in bankruptcy. The proceeding is analogous to that of a living debtor, save that the decedent's personal representative stands in his stead. The practice is assimilated to that in chancery on the administration of solvent estates. An executor who, as such, has carried on a business and incurred debts pursuant to the will of his testator, may also be adjudged a bankrupt.<sup>30</sup> None of our bankruptcy laws have had similar provisions.<sup>31</sup> It seems, however, that when the surviving partner applies, the partnership may be adjudged bankrupt, and the Federal court thereby acquires jurisdiction over the estate of the deceased partner in process of administration in a probate court.<sup>32</sup> There being no express power to administer the estates of deceased insolvents, resort must be had in such cases to the usual state tribunals. If, however, death occurs after the adjudication, the estate continues in bankruptcy.<sup>33</sup>

*Partnerships.*—This is fully considered under Section Five.<sup>34</sup>

**Subs. c. Involuntary Bankruptcy.**—Much that is said of voluntary bankruptcy, *ante*, should be read here.<sup>35</sup> The debtor petitioned against must owe at least \$1,000. Two classes of persons cannot be petitioned against—wage-earners and farmers. The word “natural” is, of course, to exclude corporations which, under § 1 (19), might be held to include these entities. The words “any unincorporated company” are considered later.<sup>36</sup>

*Wage-Earners.*—No person who “works for wages, salary, or hire, at a compensation not exceeding one thousand five hundred dollars per year” can be adjudged an involuntary bankrupt. It

29. In re Rennie, 2 Am. B. R. 182; In re Russie, 3 Am. B. R. 6, 96 Fed. 608.

30. Ex parte Garland, 10 Ves. 110; Ex parte Richardson, 3 Madd. 99.

31. Graves v. Winter, Fed. Cas. 5,710.

32. In re Pierce, 4 Am. B. R. 489, 102 Fed. 977.

33. § 8.

34. As to the effect of the infancy of one partner, see p. 51, *ante*.

35. For “infants,” “lunatics,” “married women,” “aliens,” “Indians,” “estates of decedents,” and “partnerships,” see under this Section, *ante*. For who may file involuntary petitions and the practice on the same, see §§ 18 and 59-a, *post*.

36. See p. 55, *post*.

is not presumable that, were he not thus excepted, creditors would often resort to a court of bankruptcy against such a debtor.<sup>37</sup>

*Persons Engaged Chiefly in Farming or the Tillage of the Soil.*—No person answering this description can be adjudged an involuntary bankrupt. The phrase seems to be construed strictly. Farming or tillage of the soil must be the chief occupation. Mere physical exertions are not the determining factor; but rather that occupation which the person deems of paramount importance to his welfare.<sup>38</sup> Yet, it has been held that a man engaged both in the business of farming and at that of raising cattle on a large scale was, nevertheless, within this exception;<sup>39</sup> likewise, perhaps, when the chief occupation is to raise cattle and hogs for the market,<sup>40</sup> though this is hardly "farming." One engaged chiefly in farming is within the exception, although he at the same time conducts a small business as a private banker.<sup>40a</sup> A change in occupation from business to farming since the act of bankruptcy will not avail the debtor.<sup>41</sup>

*Practice.*—The petition in involuntary cases should contain an allegation that the person petitioned against is in neither of these classes. But failure to do so, unless raised by the answer, will be deemed waived.<sup>42</sup> The allegation and proof should also show that the alleged bankrupt was not in one of these excepted classes at the time of the act of bankruptcy. A defense based on an allegation that he was, may be raised by a responding creditor, and, when raised, goes to the jurisdiction, and, if not met by a replication, is conclusive.<sup>43</sup>

37. For valuable cases under the somewhat similar phrase "workmen, clerks, and servants," see under Section Sixty-four; also discussion of the definition of "wage-earner" in Section One. A teamster working his team for day wages hauling logs and other similar services for different people is within the exception. In re Yoder, 11 Am. B. R. 445, 127 Fed. 894.

38. In re Mackey, 6 Am. B. R. 577, 110 Fed. 355; In re Drake, 8 Am. B. R. 137, 114 Fed. 229. A resident owner who has leased his farm to his son for a money rent is not within the exception. In re Matson, 10 Am. B. R. 473, 123 Fed. 743. But if he leases part of it and works the re-

mainder he is a farmer. Wulbern v. Drake, 9 Am. B. R. 695, 120 Fed. 493.

39. In re Thompson, 4 Am. B. R. 340, 102 Fed. 287. See Bank of Dearborn v. Matney, 12 Am. B. R. 482, 132 Fed. 75.

40. In re Rugsdale, Fed. Cas. 12,123.

40a. Coutts v. Townsend, 11 Am. B. R. 126, 126 Fed. 249.

41. In re Luckhardt, 4 Am. B. R. 307, 101 Fed. 807.

42. Green River Deposit Bank v. Craig Bros., 6 Am. B. R. 381, 110 Fed. 137; In re Columbia Real Estate Co., 4 Am. B. R. 411, 101 Fed. 965.

43. In re Taylor, 4 Am. B. R. 515, 102 Fed. 728.

## III. CORPORATIONS.

**Subs. b. Involuntary Bankruptcy.**—Corporations cannot become voluntary bankrupts save through § 3-a (5). The Ray bill sought to change this, but its provisions permitting business corporations to become voluntary bankrupts were stricken out in the Senate. Under the law of 1867, any business, moneyed, or commercial corporation might become an involuntary bankrupt. One of the concessions made when the present law was framed was the change, whereby, for a clause making all corporations except national banks amenable to bankruptcy, one that excepts all corporations save those within certain defined classes was substituted. The statute in this particular thus resembles that of 1867. At the same time it has been found much narrower.<sup>44</sup> It should be noted also that, notwithstanding its dissolution by the state court, if there are undistributed assets or unpaid debts, a corporation may be adjudicated bankrupt.<sup>45</sup>

*Banks.*—There are reasons of policy why these trustees of the people, whose debts are always due and whose credit is necessary to trade and industry, should be excluded. They are not only creatures of the State in a broad sense, but are supervised and inspected by the State at frequent intervals; they cannot well commit preferences. It would seem likely, however, that only those entities which are strictly banks and thus subject to official espionage, are excepted.<sup>46</sup> A corporation cannot be a "private banker" within the meaning of the term as used in this clause.<sup>46a</sup>

*Unincorporated Companies.*—This phrase manifestly means all those private bodies which occupy the middle ground between partnerships and stock corporations. The definition of "corporations" will be found in § 1 (6). It does not, of course, include municipal corporations, but it would seem to comprise membership corporations and religious, educational, and eleemosynary corporations, and the like. Previous bankruptcy laws contained no provision of this character, and there are no precedents under

<sup>44</sup>. See also the definition of "corporation" in § 1 (6).

<sup>45</sup>. In re Merchants' Ins. Co., Fed. Cas. 9,441; In re Independent Ins. Co., Fed. Cas. 7,018.

<sup>46</sup>. Compare Davis v. Stevens, 104 Fed. 235. And see In re Moench & Sons Co. (C. C. A.), 12 Am. B. R.

240, 130 Fed. 685 (affirming 10 Am. B. R. 656); In re White Mountain Paper Co. (C. C. A.), 11 Am. B. R. 633, 127 Fed. 643 (affirming 11 Am. B. R. 491).

<sup>46a</sup>. In re Surety & Guaranty Trust Co., 9 Am. B. R. 129, 121 Fed. 73.

them, nor as yet under the present law. This phrase, "any unincorporated company," was inserted while that law was in conference committee, and is not explained by any of the reports which accompanied the bill in its various stages. The rarity of failures by companies of this character, other than those organized for business purposes, will, however, prevent it from being either dangerous to such bodies or of much value to creditors.

*"Engaged Principally in."*—This phrase has already been frequently considered and interpreted by the courts.<sup>47</sup> The weight of authority declares the test to be: In what pursuit is the corporation chiefly engaged? Thus, prior to the amendment of 1903, a mining company, which also conducted a supply store, was not subject to bankruptcy;<sup>48</sup> on the other hand, it was held that a mining company chiefly engaged in smelting was.<sup>49</sup> The purposes of the corporation, as stated in its charter, are not usually controlling;<sup>50</sup> but where a corporation was organized to manufacture and sell paper made from wood pulp, and had purchased timber and erected mills but had not actually manufactured any paper, it was held subject to involuntary bankruptcy.<sup>50a</sup>

*"Manufacturing."*—This word has presumably its popular meaning, that is, the making of products from raw or prepared materials by hand or machinery.<sup>51</sup> As a general rule, a natural product if only rendered more suitable for use by an artificial process is not a manufactured article.<sup>52</sup> Under the present law, the only cases

47. The novel doctrine that a corporation may be engaged principally in two or three lines of activity was advanced by Judge Munger, of Nebraska, in an important oral decision, *In re Greater American Exposition Co.* (unreported), he holding that an exposition company, though probably not subject to bankruptcy in the function whence came its name, yet, as the lessee of space for and the sharer in percentages from concessions and exhibits, was a trading corporation, and that, these functions being equally important, each was a principal function, and an adjudication should follow.

48. *McNamara v. Helena Coal Co.*, 5 Am. B. R. 48.

49. *In re Tecopa Mining & Smelting Co.*, 6 Am. B. R. 250, 110 Fed. 120.

50. *In re Chicago-Joplin Lead & Zinc Co.*, 4 Am. B. R. 712, 104 Fed. 67; *Matter of Quimby*, 10 Am. B. R. 424, 121 Fed. 139.

50a. *In re White Mountain Paper Co.* (C. C. A.), 11 Am. B. R. 633, 127 Fed. 643, affirming 11 Am. B. R. 491.

51. *Lawrence v. Allen*, 7 How. 785; *People ex rel. U. P. T. Co. v. Roberts*, 145 N. Y. 375.

52. Thus, he who slaughters and refrigerates mutton (*People ex rel. New England Dressed Meat Co. v. Roberts*, 155 N. Y. 408), or who mines coal (*Byers v. Franklin Coal Co.*, 106 Mass. 131) is not a manufacturer; but he who works up standing timber on his own land (*In re Cowles*, Fed. Cas. 3,297) is.



are those involving mining companies,<sup>53</sup> all of them inapplicable since the amendatory act of 1903. Little difficulty will arise in determining whether a given corporation is principally engaged in manufacturing. Precedents under the corporation tax laws of the States and the internal revenue laws will prove valuable. A shipbuilding corporation,<sup>53a</sup> and a corporation engaged in constructing buildings and bridges, supplying the labor while the materials are furnished by others are included within the meaning of the word.<sup>53b</sup>

"*Trading*."—The seeming equivalent in the law of 1867 is "business;" in the law of 1841 it was "using the trade of merchandise." The meaning of "trader" in England has been well defined for centuries.<sup>54</sup> It connotes the idea of buying merchandise for the purpose of selling it for gain.<sup>55</sup> Illustrative cases under the law of 1867 will be found in the foot-note.<sup>56</sup> Under the present law, corporations engaged in furnishing water to cities,<sup>57</sup> in giving theatrical performances solely,<sup>58</sup> in conducting a saloon and restaurant business<sup>59</sup> (though the reliability of the precedent may be doubted), a water transportation company,<sup>60</sup> a social club,<sup>61</sup> a mutual fire insurance company,<sup>62</sup> a building and loan association,<sup>62a</sup> a

53. See, as typical, *In re Elk Park M. & M. Co.*, 4 Am. B. R. 131, 101 Fed. 422; *In re Woodside Coal Co.*, 5 Am. B. R. 186, 105 Fed. 56.

53a. *Matter of Marine Const. Co.* (C. C. A.), 11 Am. B. R. 640, 130 Fed. 446; *Columbia Iron Works v. National Lead Co.*, 11 Am. B. R. 340, 127 Fed. 99.

53b. *In re Niagara Contracting Co.*, 11 Am. B. R. 643, 127 Fed. 782.

54. Compare Blackstone, Vol. 2, Chap. XXXI; Parsons on Contracts, Vol. 3, Chap. XII; and *Ex parte Moule*, 14 Ves. 602; *Ex parte Lavender*, 4 Deac. & Ch. 484.

55. *Wakeman v. Hoyt*, Fed. Cas. 17,051; *In re Eeles*, Fed. Cas. 4,302.

56. The following were held traders: a baker (*In re Cocks*, Fed. Cas. 2,933); a furniture dealer (*In re Newman*, Fed. Cas. 10,175); a merchant tailor (*In re Archenbrow*, Fed. Cas. 505); a saloon-keeper (*In re Sherwood*, Fed. Cas. 12,773); but a stockbroker (*In re Moss*, Fed. Cas.

9,877); a lessor of oil lands (*In re Woods*, Fed. Cas. 17,990), and a railroad company (*In re Union Pacific R. Co.*, Fed. Cas. 14,376), were not.

57. *In re New York & Westchester Water Co.*, 3 Am. B. R. 508, 98 Fed. 711, subsequently affirmed on appeal.

58. *In re Oriental Society*, 5 Am. B. R. 219, 104 Fed. 975.

59. *In re Chesapeake Oyster & Fish Co.*, 7 Am. B. R. 173, 112 Fed. 960. But see *In re Barton Hotel Co.* (Dist. Col.), 12 Am. B. R. 335.

60. *In re Phila., etc., Co.*, 7 Am. B. R. 707, 114 Fed. 403.

61. *In re Fulton Club*, 7 Am. B. R. 670, 113 Fed. 997.

62. *In re Cameron Town Mut. Fire Ins. Co.*, 2 Am. B. R. 372, 96 Fed. 756. "See also *In re Tontine, etc., Co.*, 8 Am. B. R. 421, 116 Fed. 400.

62a. *Matter of N. Y. Bldg. & Loan Bank Co.*, 11 Am. B. R. 51, 127 Fed. 471.

company organized to buy and sell stocks, bonds and securities,<sup>62b</sup> a warehouse company,<sup>62c</sup> a corporation chartered as a common carrier,<sup>62d</sup> a corporation conducting a circulating library,<sup>62e</sup> and a laundry corporation,<sup>62f</sup> have been refused adjudication because not trading corporations; while a sanitarium,<sup>63</sup> a livery-stable company,<sup>64</sup> and a mercantile agency<sup>65</sup> have been held either trading corporations or engaged principally in mercantile pursuits.<sup>66</sup> It is a little puzzling to reconcile these decisions with each other. It is still more difficult to phrase any safe rule. Each case will necessarily turn on its own facts. It is not to be doubted, however, that, in this particular, the law is to be interpreted liberally to effectuate its purposes, *i. e.*, that all *business* corporations, as distinguished from public, quasi-public, money-saving or lending corporations, shall be amenable to bankruptcy.

*"Printing" and "Publishing."*—There are no cases as yet construing these words. They were inserted doubtless to meet the decisions under the former law that such corporations were not manufacturing companies.

*"Mercantile Pursuits."*—This appears to be by way of emphasis or explanation of the word "trading" which goes before. It probably enlarges its meaning. Cases under that head will be in point under this.

*"Mining."*—This word was inserted by the amendatory act of 1903, to meet the quite uniform holdings that such companies were neither manufacturing nor trading corporations. These cases<sup>67</sup> are, therefore, no longer the law. The meaning of the word is undoubtedly the common one, and a company which is engaged in taking from the earth any mineral or natural product for the purpose of selling or reducing it or working it up into a salable article may hereafter be petitioned against.

62b. In re Surety Guaranty & Trust Co., 9 Am. B. R. 129, 121 Fed. 73.

62c. In re Pacific Coast Warehouse Co., 10 Am. B. R. 474, 123 Fed. 749.

62d. In re Quimby Freight Forwarding Co., 10 Am. B. R. 424, 121 Fed. 139.

62e. In re Parmelee Library Co., 9 Am. B. R. 568, 120 Fed. 235, 56 C. C. A. 583.

62f. In re White Star Laundry Co., 9 Am. B. R. 30, 117 Fed. 570.

63. In re San Gabriel Sanitarium Co., 2 Am. B. R. 408, 95 Fed. 271.

64. In re Morton Boarding Stables, 5 Am. B. R. 763, 108 Fed. 791. But compare *contra*, under law of 1841, Hall v. Cooley, Fed. Cas. 5,928.

65. In re Mutual Mercantile Agency, 6 Am. B. R. 607, 111 Fed. 152.

66. See p. 56, ante, for mining corporations.

67. See foot-notes 49 and 50, ante.

*Practice.*—That the corporation comes within one or more of the premitted classes should be distinctly alleged in the petition. Otherwise, it is demurrable, and an assertion of the contrary fact in an answer, if not replied to, is conclusive.<sup>68</sup> But an order of adjudication, showing a like omission, cannot be impeached collaterally.<sup>69</sup> Aside from this allegation, the practice is the same as that when petitions are filed against individuals. The burden of proof is ordinarily upon the petitioners to show the alleged bankrupt corporation was engaged principally in a business specified in this clause.<sup>69a</sup>

**Effect of the Bankruptcy of Corporations.**—A corporation, being defined in § 1 (19) as a person, can apply for and be given a discharge. This seems to have been doubted;<sup>70</sup> but that corporations may be discharged may now be considered settled. The reason for their existence being terminated by their insolvency, it is not supposed that many bankrupt corporations will apply.

*Liability of Officers, Directors, or Stockholders.*—It has been held that the discharge of a corporation does not prevent creditors taking judgment in a state court against the corporation, at least in so far as to enable them to proceed on a stockholder's or director's liability.<sup>71</sup> This subsection, inserted by the amendatory act of 1903, is thus probably but declaratory of the law. It is, perhaps, a little broader. The "bankruptcy" of a corporation, which must include all of the steps to and including adjudication, is enough. It is possible that the corporation may not seek a discharge. At any rate, the intention of Congress to save to the creditors of corporations all the rights given them against negligent or dishonest officers, directors, or stockholders by the state or territorial or federal laws is clear. The reason which induced the prohibition on the discharge of corporations found in the law of 1867 exists no longer.<sup>72</sup>

68. See *In re Taylor*, 4 Am. B. R. 515, 102 Fed. 728; *In re Callison*, 12 Am. B. R. 344, 130 Fed. 987; *Beech v. Macon Grocery Co.*, 9 Am. B. R. 762, 120 Fed. 736, 57 C. C. A. 150; *In re Mero*, 12 Am. B. R. 171, 128 Fed. 630.

69. *In re Columbia Real Estate Co.*, 4 Am. B. R. 411, 101 Fed. 965.

69a. *Philpot v. O'Brien (C. C. A.)*, 11 Am. B. R. 205, 126 Fed. 167.

70. *In re Marshall Paper Co.*, 2 Am. B. R. 653, 95 Fed. 419, but this case was overruled by the Circuit Court of Appeals, 4 Am. B. R. 468, 102 Fed. 872.

71. *In re Marshall Paper Co.*, supra.

72. Compare Section Seventeen, post, generally, for effect of a discharge.

## SECTION FIVE.

### PARTNERS.

**§ 5. Partners.**—*a* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

*b* The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

*c* The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

*d* The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

*e* The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

*f* The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

*g* The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

*h* In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such

partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

**Analogous provisions:** In U. S.: Act of 1867, § 36, R. S., § 5121; Act of 1841, § 14.

**In Eng:** Act of 1883, §§ 110, 112, 113, 115; General Rules 258-270.

**Cross references:** To the law: §§ 1 (19); 2 (1); 3; 4; 6; 7; 8; 18; 19; 32; and 59.

**To the General Orders:** VIII, and generally to V, VI, VII, and IX.

**To the Forms:** Nos. 1 and 2.

## SYNOPSIS OF SECTION.

### I. Partnership Adjudications.

#### Historical and General.

*What is a partnership.*

*The Entity Doctrine.*

*Receivership as Act of Bankruptcy.*

#### Subs. a. Jurisdiction and Practice Before Adjudication.

*Frame of Petition.*

*When Partnership May be Adjudged Bankrupt.*

*Death, Insanity, or Infancy of a Partner.*

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**II. Administration of Partnership Estates** — Continued.**Subs. f. Distribution.**— Continued.*Proof Against, and Dividends from Each Estate.**Illustrative Cases.***III. Administration by Solvent Partner.****Subs. h. Where One or More Partners are Solvent.****I. PARTNERSHIP ADJUDICATIONS.**

**Historical and General.**— All bankruptcy laws have specific provisions regulating the adjudication of partnerships and the interrelation of the debts and assets of the partnership and its members. The English statute here resembles our present and past laws; the interpretation of the two statutes is not, however, always identical. Section 36 of our law of 1867 is strikingly similar to § 14 of its predecessor of 1841. The present section expresses in fewer words all that those sections did, and something more. It really should be a subsection of § 4; for it treats of the third class of business entities, "who may become bankrupts." General Order VIII is, in effect, a part of it.

*What is a Partnership?*— By § 1 (19) it is included in the meaning of "person." Section 1 (6) should also be read in determining what associations or companies are corporations. The section under discussion thus applies only to general partnerships. It does not extend to partnerships by estoppel or such as are partnerships as to creditors only.<sup>1</sup> With this limitation, however, the state decisions on partnership law seem controlling. Valuable precedents will also be found in numerous decisions under the law of 1867.

*The Entity Doctrine.*— But a partnership now is something other than that under the law of 1867. There the words were, "two or more persons who are partners in trade." Now it is "a partnership" that "may be adjudged a bankrupt." This phrasing, coupled with other clauses, has led to the doctrine that a partnership is in bankruptcy a legal entity<sup>2</sup> — a joint relation where the identity of the members has been lost — and that, therefore, the individuals and the partnership are entities separate and distinct from each other.<sup>3</sup> In other words, the firm must petition or be petitioned against; if the latter, the firm, or a member of it acting within the scope of the partnership, must have committed the act of bankruptcy; and, if adjudi-

1. In re Kenney, 3 Am. B. R. 353, 559, 98 Fed. 976; In re Stein (C. C. 97 Fed. 554; Lott v. Young, 6 Am. A.), 11 Am. B. R. 536, 127 Fed. 547; B. R. 436, 109 Fed. 798. As to what is a partnership, see In re Beckwith, 125 Fed. 835.  
12 Am. B. R. 453, 130 Fed. 475.

2. See In re Meyers, 3 Am. B. R. 384, 109 Fed. 857.

3. In re Sanderlin, 6 Am. B. R.

## § 5a.] Jurisdiction and Practice before Adjudication.

cation follows, the firm, *eo nomine*, must be adjudicated. This doctrine is essentially different from that of the English law, where even if the firm be proceeded against, the adjudication must be against the partners individually.<sup>4</sup> Our law and practice, prior to the present statute, were to the same effect. This new doctrine of entity, however, has already led to some decisions of far-reaching importance, and should be kept continually in mind by the student or practitioner who would understand one of the most confusing branches of the law of bankruptcy. The entity doctrine permits of the adjudication in bankruptcy of a partnership one of the members of which is insane,<sup>4a</sup> but will not justify an adjudication where some of the alleged members deny the existence and composition of the partnership.<sup>4b</sup>

*Receivership as Act of Bankruptcy.*—Under the original law, following the analogy of the corporation cases, it was held that the consent to or the appointment of receivers of a partnership was not an act of bankruptcy.<sup>5</sup> This is no longer true. Section 3-a (4), as amended, means that the appointment of a receiver of an insolvent partnership is an act of bankruptcy.<sup>6</sup>

**Subs. a. Jurisdiction and Practice before Adjudication.**—If all the partners petition voluntarily, the proceeding prior to adjudication is identical with an individual petition. The owing of debts,<sup>7</sup> and the facts as to residence, domicile, or principal place of business,<sup>8</sup> must at least appear on the face of the petition to confer jurisdiction. Conversely, if the petition be involuntary, the facts as to the partners not being included in either of the excepted classes and owing at least \$1,000,<sup>9</sup> as to the provable debts of the petitioners and the number of the creditors,<sup>10</sup> as to the commission of an act of bankruptcy within four months,<sup>11</sup> and, in cases where insolvency is necessary to the act, that it existed at the time of its commission and also at the time of the filing<sup>12</sup> must clearly appear, or

4. Act of 1883, § 115; General Rules, 264.

4a. *In re Stein & Co.*, 11 Am. B. R. 536, 127 Fed. 547.

4b. *In re McLaren*, 11 Am. B. R. 141, 125 Fed. 835.

5. *Vaccaro v. Bank*, 4 Am. B. R. 474, 103 Fed. 436; *Davis v. Stevens*, 4 Am. B. R. 763, 104 Fed. 235. See also *In re Murcur*, 8 Am. B. R. 275, 116 Fed. 655. This doctrine has been carried even so far as to require the

payment of the statutory fees for partnerships and each of the individuals in *In re Barden*, 4 Am. B. R. 31, 101 Fed. 553, and *In re Farley*, 3 Am. B. R. 266, 115 Fed. 359, though the soundness of these rulings has been frequently challenged.

6. Compare discussion under Section Three (3-a (4)), ante.

7. § 4-a.

9. § 4-b.

11. § 3-a.

8. § 2 (1).

10. § 59-b.

12. See p. 49, ante.

the court will not acquire jurisdiction. It must also appear affirmatively that both the partnership as an entity and the individuals composing it were and are insolvent at the times mentioned.<sup>13</sup> But jurisdiction often depends on other facts, discussed in detail, *post*. A petition to have a partnership adjudged bankrupt *nunc pro tunc*, the purpose of which is to overturn transactions already closed, will usually be refused.<sup>14</sup>

*Frame of Petition.*—Form No. 2 should not be relied on too implicitly. The prayer of the petition should at least ask for an adjudication of the individuals as well as of the firm. Careful practice also seems to command that words indicating that both the partners and the individuals owe debts that they cannot pay in full, and offering to surrender both firm and individual properties, be inserted. It may be that the mere statement that debts are owed is sufficient to cover the jurisdictional requirement that partnerships cannot be adjudged after the final settlement thereof, but it is better to allege that there has been no such settlement in very words. If one partner lives in another jurisdiction, that fact should be stated. If a partner refuses to join that fact should be stated, and the prayer of the petition should include a request for the issue of the usual subpoena to him as if to an alleged bankrupt. The schedules should be complete,<sup>15</sup> both for the firm and for each partner. Where the petition is against a copartnership even greater care should be used. Here Form No. 3 is not reliable other than by way of suggestion; it does not contain all the jurisdictional allegations.<sup>16</sup>

*When Partnership May be Adjudged Bankrupt.*—This limitation on the filing of petitions by or against a partnership, found in the words “after the dissolution and before the final settlement thereof,” is of little importance. It has been held that there can be no final settlement until all the debts are paid;<sup>17</sup> in other words,

13. In re Blair, 3 Am. B. R. 588, 99 Fed. 76; In re Meyer, 3 Am. B. R. 559, 98 Fed. 976; In re Miller, 104 Fed. 764; Vaccaro v. Bank, ante.

14. In re Murcur, ante.

15. That is, A (1), (2), (3), (4), (5), and B (1), (2), (3), (4), (5), and (6), with the summary.

16. As to these allegations, see ante, and compare “Acts of Bank-

ruptcy by a Partnership,” and similar paragraphs in this Section, *post*.

17. In re Levy, etc., 2 Am. B. R. 21, 95 Fed. 812; In re Meyers, 96 Fed. 408; In re Hirsch, 3 Am. B. R. 344, 97 Fed. 571. But Royston v. Wies, 7 Am. B. R. 584, 112 Fed. 962, seems to imply that lapse of time is equivalent to a settlement.



that the existence of assets is not material to a partnership adjudication. This is doubtless the law. It may be queried, however, whether, if a partner can in an individual proceeding secure a discharge that will be effective against his partnership liability,<sup>18</sup> of what avail either to creditors or to the bankrupt is the adjudication of a partnership which has no assets? In other words, the limitation stated above may, in actual practice, where the partnership has no assets, amount to an absurdity. In other respects the limitation is declaratory of the law. The mere dissolution of a copartnership does not destroy its existence as to its creditors. It was otherwise under the law of 1867.<sup>19</sup>

*Death, Insanity, or Infancy of a Partner.*—The estate of a deceased debtor cannot in this country be adjudged a bankrupt.<sup>20</sup> It follows that there can be no partnership adjudication against a firm, one member of which is dead.<sup>21</sup> The surviving partner can still be adjudged bankrupt as an individual and as survivor;<sup>22</sup> the court of bankruptcy may thereby obtain jurisdiction of the partnership estate, or by consent, if in the hands of an administrator;<sup>23</sup> and the estate of the deceased partner is in any event still liable to pay the firm debts.<sup>24</sup> This absence of jurisdiction is unfortunate, but it leads to confusion rather than a denial of justice. The rights of creditors, in all ordinary cases, are fully conserved, even though the administration of assets must be in two courts. The death of a partner after adjudication does not affect the proceeding.<sup>25</sup> What has been said previously of the effect of insanity on jurisdiction<sup>26</sup> applies with equal force here. If the court cannot adjudge the insane person bankrupt, it cannot adjudge the other entity, *i. e.*, the partnership of which he is a member, bankrupt. It is doubted whether the law, which, unlike the English statute, does not authorize the intervention of committees in involuntary pro-

18. See under Section Fourteen, post; see also, for instance, *In re Feigenbaum*, 7 Am. B. R. 339.

19. See cases cited in *In re Hirsch*, supra.

20. Note, p. 53, ante.

21. Compare *In re Temple*, Fed. Cas. 13,825. But if the adjudication has been made it cannot be attacked

collaterally. *Wilson v. Parr*, 8 Am. B. R. 230.

22. *In re Stevens*, Fed. Cas. 13,393.

23. *In re Pierce*, 4 Am. B. R. 489, 102 Fed. 977; *Briswalter v. Long*, 14 Fed. 153.

24. *Vaccaro v. Bank*, ante.

25. § 8.

26. See p. 51, ante.

ceedings against the lunatics they represent, warrants an adjudication against a firm so situated.<sup>27</sup>

*Acts of Bankruptcy by a Partnership.*—The general rule that whatever a partner does within the scope of the partnership binds the other partners applies to the commission of acts of bankruptcy. Since a partnership is now an entity, petitions which, under the previous law, would not confer jurisdiction because the act of bankruptcy was not committed by all the partners,<sup>28</sup> are now sufficient. Generally speaking, the commission of an act of bankruptcy as to the partnership property by either partner amounts to an act of bankruptcy by the firm.<sup>29</sup> It has thus been held that even the fifth act of bankruptcy, when committed by one partner, binds the copartnership;<sup>30</sup> on the other hand, the embezzlement of the funds of the partnership by an absconding partner is not an act of bankruptcy.<sup>31</sup> It was held under the former law that the commission of acts of bankruptcy by the partners as to their individual property only was sufficient to warrant an adjudication of the firm.<sup>32</sup> Whether this is now the law, the partnership being an entity, is doubtful. However, the equities would seem to suggest an exception to the new doctrine of entities in such a case.

*Petitions by the Partners or a Partner.*—It has been held, following the entity doctrine, that separate petitions must be filed by the firm and by the individuals.<sup>33</sup> The better opinion is, however, to the contrary, viz., that but one petition need be filed.<sup>34</sup> Where, however, some but not all the partners file a voluntary petition, the proceeding takes on a mongrel nature. It is voluntary as to the petitioning partners, but, to a limited extent, involuntary as to the others. In such cases it is, of course, not necessary to allege or prove as to the nonconsenting partner the commission of an act

<sup>27</sup>. Compare, however, *In re O'Brien*, 2 N. B. N. Rep. 312; *In re Stein* (C. C. A.), 11 Am. B. R. 536, 127 Fed. 547. For the effect of the infancy of one partner on a petition against a copartnership, see p. 57, ante; and in general, under Section Four, for all persons under legal disability.

<sup>28</sup>. Compare *In re Richmond*, Fed. Cas. 11,632.

<sup>29</sup>. *In re Meyer*, 3 Am. B. R. 559, 98 Fed. 976, affirming *Bank v. Meyer*, 1 Am. B. R. 565, 92 Fed. 896; to same

effect, *In re Grant Bros.*, 5 Am. B. R. 837.

<sup>30</sup>. *In re Kersten*, 6 Am. B. R. 516, 110 Fed. 929.

<sup>31</sup>. *Davis v. Stevens*, 4 Am. B. R. 763, 104 Fed. 235.

<sup>32</sup>. *In re Penn*, Fed. Cas. 10,927.

<sup>33</sup>. *In re Barden*, 4 Am. B. R. 31, 101 Fed. 553; *In re Farley*, 8 Am. B. R. 266, 115 Fed. 359.

<sup>34</sup>. *In re Gay*, 3 Am. B. R. 529, 98 Fed. 870; *In re Langslow*, 1 Am. B. R. 258, 98 Fed. 969.

of bankruptcy, or, in fact, any of the jurisdictional facts peculiar to involuntary applications; but such partner may set up the defense of solvency.<sup>34a</sup> But, under General Order VIII, the non-joining or absentee partner is entitled to the same notice as if petitioned against, and to answer to the petition and to allege and prove any of the facts which would be pertinent to a proceeding against the partnership.<sup>35</sup> Useful cases on these propositions will be found in the foot-note.<sup>36</sup> *In re Murray* gives a convenient form for notice to the nonconsenting partner. This notice may, of course, be given by publication;<sup>37</sup> but such notice is so far jurisdictional that the consent of nonjoining partners after adjudication of the bankruptcy of the firm will not render it valid.<sup>38</sup> It seems that immediately the partnership adjudication is granted, the proceeding again becomes strictly voluntary.<sup>39</sup> It may be doubted whether the court has jurisdiction to adjudge the nonconsenting insolvent partner a bankrupt individually unless the prayer of the petition asks individual adjudications,<sup>40</sup> but, under principles discussed later in this Section, that would seem immaterial, the partnership adjudication drawing to itself of necessity the administration of the individual estates as well. The rule is different where the nonconsenting partner proves to be solvent. Where the same persons are members of distinct firms, it was held under the former law that they could not petition together.<sup>41</sup> The entity doctrine seems to intensify rather than weaken this ruling. Where the petitioners are members of different partnerships with others who do not join, adjudication will undoubtedly be refused, but with leave to refile in the form of separate petitions.<sup>42</sup>

*Adjudication.*—The entity doctrine requires that the adjudication, while substantially as prescribed by Form No. 12, should declare, after modifying its recitals slightly, that “the copartnership known as Smith & Jones, composed of John Smith and George Jones, and

34a. *In re Forbes*, 11 Am. B. R. 787, 128 Fed. 137.

35. It seems that notice to an undisclosed partner is not necessary. *In re Harris*, 4 Am. B. R. 132.

36. See General Order VIII; *In re Altman*, 2 Am. B. R. 407, 95 Fed. 263; *In re Laughlin*, 3 Am. B. R. 1, 96 Fed. 589; *In re Murray*, 3 Am. B. R. 601, 96 Fed. 600; *In re Carleton*, 8 Am. B. R. 270, 115 Fed. 246.

37. See under Section Eighteen of this work.

38. *In re Russell*, 3 Am. B. R. 91, 97 Fed. 32; *In re Murray*, supra; *In re Altman*, supra.

39. Compare *In re Murray*, supra, with *Medsker v. Bonebrake*, 108 U. S. 66.

40. *Chemical Bank v. Meyer*, affirmed *In re Meyer*, 3 Am. B. R. 559, 98 Fed. 976.

41. *In re Wallace*, Fed. Cas. 17,095.

42. As to the amendment of petitions in these cases, see *In re Freund*, 1 Am. B. R. 25; *In re McFaun*, 3 Am. B. R. 66, 96 Fed. 592.

the said John Smith and George Jones as individuals<sup>43</sup> be and each is hereby declared and adjudged bankrupt." If, however, the petition asks for a partnership adjudication only, that alone should be granted.<sup>44</sup> The form of the adjudication is, however, important only to the bankrupts.

*Effect of Form of Adjudication on Discharge.*—If the adjudication is of the firm only, the discharge following it will be a bar only to firm debts.<sup>45</sup> If the application is for individual bankruptcies only, the discharge will not affect firm liabilities.<sup>46</sup> But, while in the first case it would seem necessary that the individuals file new separate petitions, in the latter case an amendment of the petition and adjudication praying for the partnership bankruptcy has been allowed. Where new individual petitions are filed, they may be consolidated with the pending partnership proceeding. Where, however, the adjudication is of the individual partners only, a question has arisen which is still undetermined. Following the entity doctrine and the controlling authorities under the former law,<sup>47</sup> the earlier cases held that to cut partnership debts there must be a partnership adjudication.<sup>48</sup> The later cases, however, seem to hold that a discharge resting on an individual adjudication will, provided there be no firm assets and the firm creditors are scheduled and receive notice, be an available bar to subsequent suits on the bankrupt's partnership liabilities.<sup>49</sup> While such a view is necessarily an exception to the entity doctrine, it seems more reasonable. The Meyers case is clearly distinguishable, for there there were firm assets.<sup>50</sup> This question should soon be authoritatively settled. Should the doctrine of the Meyers case prevail, hundreds of discharges will prove ineffectual, and a second proceeding become necessary. Of course, if the adjudication is of the partnership but not of all the

43. This latter only if individual bankruptcy has been asked.

44. See *Bank v. Meyer*, 1 Am. B. R. 565, 92 Fed. 896, and *In re Sanderlin*, 6 Am. B. R. 384, 109 Fed. 857; though the doctrine of the former case seems to be accepted with caution in *In re Stokes*, 6 Am. B. R. 262, 106 Fed. 312.

45. *In re Hale*, 6 Am. B. R. 35, 107 Fed. 432.

46. *In re Meyers*, 3 Am. B. R. 260, 97 Fed. 753; *In re Morrison*, 11 Am.

B. R. 498, 127 Fed. 186. But compare *In re Feigenbaum*, 7 Am. B. R. 339.

47. See *Amsinck v. Bean*, 22 Wall. 395-405, and other cases cited in Judge Brown's opinion in the Meyers case, immediately post.

48. *In re Freund*, ante; *In re Meyers*, 2 Am. B. R. 707, 96 Fed. 408.

49. *In re Laughlin*, ante; *Jarecki Mfg. Co. v. McElwaine*, 5 Am. B. R. 751; *In re Feigenbaum*, supra.

50. Likewise of *In re McFaun*, 3 Am. B. R. 66, 96 Fed. 592, where there was no notice to firm creditors.

partners, individual creditors of the nonconsenting insolvent partner are not affected by the discharge.<sup>51</sup>

**Subs. c. Where Partners are Domiciled in Different Districts.**—The analogous provision in the law of 1867 was: "if such copartners reside in different districts, that court in which the petition was first filed shall retain exclusive jurisdiction over the case." This clause did not occur in the law of 1841. General Order XVI under the law of 1867 is substantially the same as present General Order VI. Subs. c. being, however, merely permissive and not mandatory, as was the corresponding clause under the former law, a new sentence, expressive of the discretion thus given the court, has been added to General Order VI. The latter supplements subs. c and gives it effect. Controlling precedents will be found in the adjudicated cases under the former law.<sup>52</sup> Cases under both the former and the present law are discussed in the foot-note.<sup>53</sup>

## II. ADMINISTRATION OF PARTNERSHIP ESTATES.

**Subs. b. Choice of Trustee.** The present law, like those of 1841 and 1867, gives the choice of the trustee of a bankrupt copartnership to the creditors of the latter.<sup>54</sup> In this there seems a discrimination in favor of the joint creditor, for the individual creditor has a

51. Compare, for collateral attack and generally on the effect of discharges on partnership liabilities, Sections Fourteen and Seventeen, post.

52. For the transfer of cases where petitions are filed against partners in different districts, see under Section Thirty-two, post.

53. Under the former law, the court which first acquired jurisdiction of one of the partners had exclusive jurisdiction over both subject-matter and all the partners (In re Boylan, Fed. Cas. 1,757; In re Penn, Fed. Cas. 10,927); but where the partners resided in districts other than that which was the place of the partnership business, it was held that an involuntary petition against the firm could be filed only in the district where the business was conducted (Cameron v. Canieo, Fed. Cas. 2,340). This rigid rule as to priority of time has given place under the present law to the flexible rule of convenience to the parties in in-

terest (Compare In re Waxelbaum, 3 Am. B. R. 392, 98 Fed. 589). The whole question is ably discussed in a recent case where petitions were filed almost simultaneously in the Southern and Western Districts of New York (In re Sears, 7 Am. B. R. 279, 112 Fed. 58). It seems that a proceeding may be brought in any district where the partner might have petitioned as an individual (Compare § 2 (1)), and that the petition may be amended to show jurisdiction (In re Blair, 3 Am. B. R. 588, 99 Fed. 76), even to show an act of bankruptcy alleged in the other petition, provided that act post-dates that originally pleaded (In re Sears, 8 Am. B. R. 713, 117 Fed. 294, modifying on review In re Sears, supra, to that extent). On this general subject, compare § 112 of the English Act of 1883, and the cases which have been decided under it.

54. Compare In re Phelps, Fed. Cas. 11,071.

petitioning creditor's debt in proceedings against the copartnership;<sup>55</sup> so also firm creditors can vote for the trustees of the individual estates,<sup>56</sup> while individual creditors cannot, of course, vote at meetings of firm creditors. The reasons for this apparent preferment of firm over individual creditors will appear later.<sup>57</sup>

**Subs. d. Separate Accounts.**—The trustee of a partnership and the individuals composing it must keep separate accounts of each estate.<sup>58</sup> This follows from the very nature of his duties and the interrelation of the debts and assets over which he is given charge. There were similar clauses in the laws of 1841 and 1867. They are merely declaratory of the law.

**Subs. e. Expenses.** The expenses of administration are apportioned to the individual and partnership estates "as the court shall determine." There are no reported cases under the present law.<sup>59</sup> Those construing the corresponding clause of the Act of 1867 are of little value.

**Subs. g. Cross-Proof of Claims.** Any claim which one member of a firm has against it may be proven against the firm, and *vice versa*. The general rule confining firm creditors to firm assets and individual creditors to individual assets is discussed later. But this subsection does not permit a solvent partner to prove against the separate estate of his bankrupt partner until all the partnership creditors have been paid in full;<sup>60</sup> nor a retired partner on notes received by him for his interest in the firm.<sup>61</sup> It is, however, well settled that the right of subrogation between a partnership estate and the estate of a partner exists.<sup>62</sup> Hence, when a retired partner is later compelled to respond to his partnership liability, because the continuing partner is unable to do so, he becomes subrogated to the claim of the creditors *pro tanto*, and thus may prove against the

55. In re Mercur, 2 Am. B. R. 626, 95 Fed. 634.

56. In re Webb, Fed. Cas. 17,317.

57. For the method of choosing the trustee, see under Sections Forty-four and Fifty-six of this work.

58. In re Denning, post.

59. For expenses of administration in general, see Sections Sixty-two and Sixty-four.

60. In re Stevens, 5 Am. B. R. 9, 104 Fed. 323; Emery v. Bank, Fed. Cas. 4,446.

61. In re Denning, 8 Am. B. R. 133, 114 Fed. 219.

62. In re Dillon, 4 Am. B. R. 63, 100 Fed. 627; In re May, Fed. Cas. 9,327; In re Foot, Fed. Cas. 4,906.

partnership estate as well as the separate estate of the bankrupt partner.<sup>63</sup>

*"So as to Prevent Preferences."*—Nothing equivalent to subs. g appeared in former bankruptcy statutes. There are as yet no adjudicated cases on the meaning of the words above quoted. Manifestly, they and the clause in which they are found supplement and emphasize the first clause of the section. Whether "preferences" here means a bankruptcy preference as defined in § 60-a is doubtful. Yet, the estate of the individual being often a creditor of the copartnership and *vice versa*, it is possible that the definition of "preference" there phrased may apply. It has been said to be "aimed at the fraud brought about by partners agreeing just before bankruptcy to change joint into separate estates," thus accomplishing preferences to the separate creditors. But it is hardly supposable that the partners so agreeing will be able to show themselves solvent at the time and, unless they can, the transaction becomes actually fraudulent and may be disregarded.

**Subs. f. Distribution.** Where the adjudication is of the partnership only and there are no separate assets belonging to the individuals, administration and distribution follow the same practice and rules as in individual cases. Where, however, there are both joint and separate estates, especially where the court has not jurisdiction of all the members, complications result which require careful treatment.<sup>64</sup>

*Joint Creditors Share in Joint Estates; Individual Creditors in Separate Estates.*—The rule of law phrased in the text is found in almost the identical words in the statutes of 1841 and 1867.<sup>65</sup> This

63. Compare generally on this subject § 40 (3) of the English Act of 1883, General Rule No. 293, and cases cited in Baldwin on Bankruptcy, 8th ed., pp. 510-520.

64. Some of these complications have been discussed ante; another class of them will be found under subsection h, post.

65. The corresponding section of the English Act of 1883, § 40 (3), is as follows:

(3) In the case of partners the joint estate shall be applicable in the

first instance in the payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates, it shall be dealt with as a part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as a part of the respective separate estate in proportion to the right and interest of each partner in the joint estate. (See also § 59 of the same act.)

is simple and, in most cases, easily applied. Yet, it is subject to exceptions. Thus, it has been held that, where there are no firm assets and no solvent living partner, the firm creditors share *pari passu* with the individual creditors.<sup>66</sup> The exception itself is qualified by cases (1) which seem to overlook the necessity of the existence of a solvent living partner;<sup>67</sup> and (2) which question whether it is absolutely essential that there be no assets or merely not sufficient assets to pay expenses of administration.<sup>68</sup> The tendency is, however, to cast aside this ancient and inequitable exception.<sup>69</sup> The opinion of Judge Lowell in the Wilcox case is an historical monograph of great value. It is to be hoped that it has sounded the knell of all exceptions to the broad rule that joint creditors share in joint assets and individual creditors in individual assets.<sup>70</sup>

*What are Firm Assets and What are Individual Assets.*—Questions of this character frequently arise, sometimes from the nature of the property, but more often from transactions between the partners, or between the firm and one partner. Again, the test is substantially *bona fides*. If the firm be solvent and the transaction be in good faith, one member can purchase the assets or buy out the interest of the other partners.<sup>71</sup> But if the firm be insolvent, or if for any reason the transaction would be inequitable, it will be treated as void.<sup>72</sup> It is well settled also that real property purchased for partnership purposes with partnership funds, even though held in the name of an individual, is, as to the firm's creditors, personal

66. Story on Part., § 380; Ex parte Sadler, 15 Ves. 52; In re Janes, 11 Am. B. R. 792, 128 Fed. 527; Conrader v. Cohen, 9 Am. B. R. 619, 121 Fed. 801, affirming In re Conrader, 9 Am. B. R. 85; In re Janes, 11 Am. B. R. 792, 128 Fed. 527.

67. In re Mills, Fed. Cas. 9,611; In re Knight, Fed. Cas. 7,880; In re Downing, Fed. Cas. 4,044.

68. In re Goedde, Fed. Cas. 5,500; In re McEwan, Fed. Cas. 8,783.

69. In re Wilcox, 2 Am. B. R. 117, 94 Fed. 84; In re Mills, 2 Am. B. R.

667, 95 Fed. 269; In re Daniels, 6 Am. B. R. 699. See also In re Green, 8 Am. B. R. 553, 116 Fed. 118.

70. In re Mosier, 7 Am. B. R. 268, 112 Fed. 138. The view expressed in the text was approved by Mack, referee, in In re Corcoran, 12 Am. B. R. 284. But see In re Janes, supra.

71. In re Collier, Fed. Cas. 3,002; In re Long, Fed. Cas. 8,476; In re Wiley, Fed. Cas. 17,656.

72. Compare § 5-g; and see In re Rudnick, 4 Am. B. R. 531, 102 Fed. 750; In re Byrne, Fed. Cas. 2,270.



property.<sup>73</sup> Generally speaking, the partnership property consists of its money, its stock in trade, its outstanding accounts, and all other property purchased by the firm's money.<sup>74</sup> While the individual property consists of those chattels or rights possessed by the individual partner solely.<sup>75</sup> Property originally owned by one or more partners and used for partnership purposes may be joint or separate estate as agreed between the parties.<sup>76a</sup>

*What are Firm Debts and What are Individual Debts.*—This question often arises where one partner has bought out the other and assumed the debts. The debts thereby become the individual debts of the continuing partner, provided the firm was solvent and the transaction was not tainted with fraud.<sup>76</sup> It also arises where each member of the firm has in its behalf incurred an individual liability by signing his name instead of the firm name. The debt thereby becomes individual only.<sup>77</sup> As a rule, however, it will not be difficult to distinguish between firm obligations and individual obligations.<sup>78</sup> An individual debt is none the less such because it is entered on the firm books without the knowledge of the creditor and payments have been made thereon by checks on partnership funds.<sup>78a</sup>

*Proof against and Dividends from Each Estate.*—Since the Act of 1861, in England, joint and several creditors have been permitted to prove against and receive dividends from both joint and separate estates.<sup>79</sup> The weight of American authority has always

<sup>73</sup>. Thus, for instance, *Greenwood v. Marvin*, 111 N. Y. 423; see *In re Groetzing*, 11 Am. B. R. 723, 127 Fed. 814, affirming 6 Am. B. R. 399.

<sup>74</sup>. See *Hiscock v. Jaycox*, Fed. Cas. 6,531; *Osborn v. McBride*, Fed. Cas. 10,593.

<sup>75</sup>. *In re Lowe*, Fed. Cas. 8,564; *In re Clark*, Fed. Cas. 2,798.

<sup>75a</sup>. *In re Swift*, 9 Am. B. R. 237, 114 Fed. 947 (in which case the evidence was considered and held sufficient to justify a finding that seats in a stock exchange, owned by the members and never transferred to the firm, but used for firm business, were a part of a joint estate). See *Buckingham v. Bank*, 12 Am. B. R. 465, 131 Fed. 192.

<sup>76</sup>. *In re Downing*, Fed. Cas. 4,044; *In re Collier*, Fed. Cas. 3,002. Com-

pare also *In re Denning*, 8 Am. B. R. 133, 114 Fed. 219.

<sup>77</sup>. *In re Webb*, Fed. Cas. 17,313; *In re Herrick*, Fed. Cas. 6,420; *Strouse v. Hooper*, 5 Am. B. R. 225, 105 Fed. 590.

<sup>78</sup>. Compare also, for firm debts, *In re Holbrook*, Fed. Cas. 6,588; *In re Tesson*, Fed. Cas. 13,844; *In re Kitzineer*, Fed. Cas. 7,861; *Taylor v. Rasch*, Fed. Cas. 13,800; and, for individual debts, *In re Mills*, Fed. Cas. 9,611; *In re Bucyrus Machine Co.*, Fed. Cas. 2,100; *In re Dell*, Fed. Cas. 3,774.

<sup>78a</sup>. *Hibberd v. McGill*, 12 Am. B. R. 101, 129 Fed. 590, affirming 10 Am. B. R. 550. See *First Nat. Bank v. Bank*, 12 Am. B. R. 429, 131 Fed. 422.

<sup>79</sup>. Compare *Baldwin on Bankruptcy*, 8th ed., p. 518.

been in favor of this rule.<sup>80</sup> A common instance is a note made by a firm and indorsed by the members of the firm. Though at first glance this rule seems inequitable, the firm and the individuals are separate entities and have made separate contracts and may, therefore, be held to the performance of them. There are as yet no adjudicated cases under the present law. The doctrine seems well settled by the cases under the law of 1867, some of which are cited above.

*Illustrative Cases.*—Some of the numerous cases and authorities on the distribution of partnership and individual assets are discussed in the foot-note.<sup>81</sup>

### III. ADMINISTRATION BY SOLVENT PARTNER.

**Subs. h. Where One or More Partners are Solvent.**—This subsection is new, but is declaratory of the practice under the former law. The right to administer is absolute, unless waived by the solvent partner. This doctrine seems to spring from the fact that bankruptcy works a dissolution of the firm, and the solvent partner may, therefore, close up the business of the firm as if the bankrupt member were actually dead. The provision commanding expedition and an accounting to the trustee should also be noted. It would seem that, by allowing an adjudication of partnership bankruptcy, as by making no response when served with notice

<sup>80</sup>. In re Bigelow, Fed. Cas. 1,397; Mead v. Bank, Fed. Cas. 9,365; Emery v. Canal Bank, Fed. Cas. 4,446.

<sup>81</sup>. See §§ 555-564 of the title "Bankruptcy" in the American Digest, Century edition (Vol. 6, pp. 595-606). The treatises on the English Bankruptcy Law, of which Baldwin's and Williams' and Robson's are typical, should be consulted for analogous cases arising under the system from which our doctrine of distribution has been inherited.

Our courts, under the present law, have held, among other things, as follows: (1) *As to individual debts not provable against firm assets*, that, where a firm indorsement on an individual note was made while the firm was embarrassed and without any new consideration, the claim should not be allowed against the partnership estate

(In re Jones, 4 Am. B. R. 141, 100 Fed. 781); and that the surrender of the firm note more than four months before the bankruptcy and the taking of an individual note instead, makes the holder a creditor of the individual estate only, even though the firm continued to pay the interest (In re Lehigh Lumber Co., 4 Am. B. R. 221, 101 Fed. 216); that a solvent partner is as to the partnership and individual estates an individual creditor (In re Stevens, 5 Am. B. R. 9, 104 Fed. 323); and that under the laws of South Carolina a sealed note given by one member of a firm without authority from his copartners and not confirmed or ratified by them is not provable against the firm (Pollock v. Jones, 10 Am. B. R. 616, 124 Fed. 163, affirming 9 Am. B. R. 262); as to proof of notes signed by individual

as provided in General Order VIII, or by failing to disclose the relation and knowingly permitting an adjudication, this right to administer will be deemed waived.<sup>82</sup> It can also be waived by a writing or declaration to that effect. But this subsection does not apply where the solvent partner retired shortly before the bankruptcy and holds the continuing partner's notes for his interest in the firm.<sup>83</sup>

members of a firm under seal, see *Davis v. Turner*, 9 Am. B. R. 704, 120 Fed. 605, 56 C. C. A. 669; see also *Merchants' Bank v. Thomas*, 10 Am. B. R. 299, 121 Fed. 306, 57 C. C. A. 374; (2) *As to firm debts not provable against individual assets*, that, where partnership creditors have received 55% from a proceeding in the state court, they cannot prove claims in the individual bankruptcy of one of the partners unless they surrender such 55% (*In re Mills*, 2 Am. B. R. 667, 95 Fed. 269); and that a suit by the solvent partner on a partnership debt is an election of remedies, and a claim cannot thereafter be proven against the individual estate of the bankrupt partner (*In re Polidori*, 2 N. B. N. Rep. 922. See also on the question of jurisdiction, where a firm creditor presents a claim against the individual estate, *In re Sanderlin*, 6 Am. B. R. 384, 109 Fed. 857); and where real estate was in the name of the bankrupt, but as between the partners it appeared to have been firm property, individual creditors have no claim on the proceeds (*In re Groet-*

*zinger*, 6 Am. B. R. 399, 110 Fed. 366); (3) *In general*, a firm creditor may prove against the individual estate on individual notes taken by him and credited on the partnership debt (*In re Stevens*, supra); a partner who purchases judgments against his firm may prove them against the individual estates to the amount of his partners' respective shares (*In re Carmichael*, 2 Am. B. R. 815, 96 Fed. 594); a note made by the firm and indorsed by a member of it continues to be the obligation of the firm, whether the individual bankrupt's liability as indorser is fixed or not (*Lamoille Bank v. Stevens' Estate*, 6 Am. B. R. 164, 107 Fed. 245); notes taken by a partner in payment of his interest in the firm within four months of the bankruptcy of the continuing partner are not provable against the latter until all the firm creditors are paid (*In re Denning*, 8 Am. B. R. 133, 114 Fed. 219).

82. *In re Harris*, 4 Am. B. R. 132, 108 Fed. 517.

83. *In re Denning*, ante.

## SECTION SIX.

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### EXEMPTIONS OF BANKRUPTS.

**§ 6. Exemptions of Bankrupts.**—*a* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

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**Analogous provisions:** In U. S.: Act of 1867, § 14 (as amended by Act of June 8, 1872, and by Act of March 23, 1873), R. S., § 5045; Act of 1841, § 3; Act of 1800, §§ 34, 35, 53.

**In Eng.:** Act of 1883, § 64 (2).

**Cross references:** To the law: §§ 2 (11), 7-a (8), 47-a (11), and 70-a.

**To the General Orders:** XI, XVII, and, by analogy, XV.

**To the Forms:** No. 47, and, by analogy, No. 27.

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### SYNOPSIS OF SECTION.

#### I. Exemptions and the Constitutionality of the Clause.

History and Comparative Legislation.

*In the United States.*

Constitutionality.

#### II. Jurisdiction Over Exempt Property.

Hearing and Determining Claims.

*Rules Generally Applicable.*

Trustee's Rights and Duties.

#### III. Right of Bankrupt to Exemptions.

As Affected by Time and Place.

As Affected by Assertion or Waiver of Claim.

*Waiver.*

As Affected by the Circumstances of Him Who Claims.

**III. Right of Bankrupt to Exemptions — Continued.****As Affected by the Kind of Property Claimed.***Homesteads.**Insurance Policies.**Pension Money.**Partnership Assets.***IV. Miscellaneous.***In Property Fraudulently Conveyed or Concealed.**In Incumbered Property.**Practice.***V. Table of Cases on Exemptions Under the Present Law Arranged by States.****I. EXEMPTIONS AND THE CONSTITUTIONALITY OF THE CLAUSE.**

**History and Comparative Legislation.**—Ever since bankruptcy laws ceased to be essentially penal, allowances or exemptions to the bankrupt have been sanctioned by statute. The law takes his property from him and gives it to his creditors. Anglo-Saxon jurisprudence, however, has for nearly two centuries decreed either that the creditors shall make the bankrupt an allowance such as will keep him and his family from want until he can begin again, or else shall permit him to retain a specific sum to the same end. The former is at present the English method; the latter the American. By § 64 (2) of the English Act of 1883, the trustee, with the permission of the committee of inspection, may from time to time make an allowance to the bankrupt for his support and that of his family. Formerly, the English bankrupt was given a certain proportion of his assets for the same purpose.<sup>1</sup>

*In the United States.*—Our first law, besides exempting wearing apparel and beds and bedding (§ 18) and giving an allowance for the necessary support of the debtor and his family during the pendency of his proceeding (§ 53), allowed him a small percentage of the assets, with an upward limit as to the total, but on a sliding scale dependent on dividends paid to creditors. This, though generous, was at least uniform throughout the country. The law of 1841 was also uniform; under it (§ 3) wearing apparel, household furniture, and other necessary articles to the value of not over

1. Compare Massachusetts Insolvency Law, Chap. 163, Revised Laws of 1901.

\$300, were set aside by the assignee for the bankrupt. The law of 1867, as amended (R. S., § 5045), re-enacted the provisions of the previous law, though increasing the upward limit to \$500, and, in addition, after exempting the arms and equipment of one who had served as a soldier, gave effect to the exemption laws of the States to such extent as such laws were more liberal than the bankruptcy law. From this latter idea, our present far-reaching clause on exemptions sprang. In a country where trade is necessarily liquid, and, owing to our division into States, the dangers from diverse exemption laws great, by the express provision of the federal statute, the state and not the federal law determines what portion of his estate a bankrupt may retain. The Ray bill sought to graft three exceptions on this general rule, but the Senate struck them out. The law as to exemptions remains as originally passed. That the result is inequitable is as true as it is that a remedy in the nature of a uniform national exemption law is for the time impossible. Thus, to-day, in some States the law's allowance of bread money is the same as that under the law of 1841; in others, it is so large as often to exhaust the estate.

**Constitutionality.**—One ground of attack on the constitutionality of the bankruptcy law of 1867 was that it was not uniform as to exemptions. There was no authoritative determination of this question by the Supreme Court. The lower courts, however, almost without exception, held that the uniformity required by the constitution was geographical only, and that the law was uniform, though, in this particular, giving effect to the local statutes of the debtor's domicile.<sup>2</sup> The Supreme Court has already settled the question under the present law, by declaring that law constitutional in spite of its want of uniformity as to exemptions.<sup>3</sup>

## II. JURISDICTION OVER EXEMPT PROPERTY.

**Hearing and Determining Claims.**—It will readily be seen that, in the nature of things, claims to exemptions will be frequent, and

2. In re Beckerford, Fed. Cas. 1,209; In re Jordan, Fed. Cas. 7,514; In re Smith, Fed. Cas. 12,996; Darling v. Berry, 13 Fed. 659; Dozier v. Wilson, 84 Ga. 301. Contra, In re Deckert, Fed. Cas. 3,728.

3. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1. See also In re Richard, 2 Am. B. R. 506, 94 Fed. 633; In re Buelow, 2 N. B. N. Rep. 26, 98 Fed. 286.

cases growing out of such claims numerous. Space will not permit the citation of all the cases even under the existing statute. For those under the laws of 1867 and 1841, resort should be had to the text-books of the periods and to the digests.<sup>4</sup> A few general principles should be borne in mind.

*Rules Generally Applicable.*—The state law controls, and its meaning is fixed by the interpretation of the highest courts of the State,<sup>5</sup> unless there be no authoritative determination there, and then by the federal courts having jurisdiction of the case. It was not the intent of the section to enlarge the exemptions available to the bankrupt under the state law.<sup>5a</sup> The law of the State of a bankrupt's domicile during the greater portion of the preceding six months is the law under which his exemptions will be allowed.<sup>6</sup> A court of bankruptcy has jurisdiction to determine the merits of the bankrupt's claim to exemptions, but, as a rule, has no jurisdiction over the property claimed,<sup>7</sup> and cannot order its sale.<sup>7a</sup> This jurisdiction, so far as it goes, is exclusive.<sup>8</sup> Property set apart to a bankrupt under his claim to exemption forms no part of his estate in bankruptcy.<sup>8a</sup> The trustee has no title to the exempt property, but only a qualified right to possession.<sup>9</sup> The general grant of power

4. See, for instance, American Digest, Century Edition, "Bankruptcy," §§ 656-678.

5. In re Duerson, Fed. Cas. 4,117; In re Stevenson & King, 2 Am. B. R. 230, 93 Fed. 789; In re Buelow, 98 Fed. 86; In re Tobias, 4 Am. B. R. 555, 103 Fed. 68; Richardson v. Woodward, 5 Am. B. R. 94, 104 Fed. 873; In re Anderson, 6 Am. B. R. 555, 110 Fed. 141; In re Manning, 7 Am. B. R. 571, 112 Fed. 948; In re Stone, 8 Am. B. R. 416, 116 Fed. 35; Page v. Edmunds, 9 Am. B. R. 277, 187 U. S. 596.

5a. In re Boyd, 10 Am. B. R. 337, 120 Fed. 999.

6. In re Stevens, Fed. Cas. 13,392; In re Lynch, 4 Am. B. R. 262, 101 Fed. 579.

7. In re Camp, 1 Am. B. R. 165, 91 Fed. 749; In re Hatch, 4 Am. B. R. 349, 102 Fed. 280; In re Hill, 2 Am. B. R. 798, 96 Fed. 185; Woodruff v. Cheeves, 5 Am. B. R. 296, 105 Fed. 601, reversing In re Woodruff, 2 Am.

B. R. 678, 96 Fed. 317; In re Little, 6 Am. B. R. 681, 110 Fed. 621; Powers Dry Goods Co. v. Nelson, 7 Am. B. R. 506, and foot-note; In re Jackson, 8 Am. B. R. 594, 116 Fed. 46; Lockwood v. Exchange Bank, 10 Am. B. R. 107, 190 U. S. 294; In re Brumbaugh, 12 Am. B. R. 204, 128 Fed. 971; In re Boyd, 10 Am. B. R. 337, 120 Fed. 999; McKenney v. Cheney, 11 Am. B. R. 54 (Ga.).

7a. Ingram v. Wilson, 11 Am. B. R. 192, 125 Fed. 913.

8. In re Overstreet, 2 Am. B. R. 486; In re Bragg, 2 N. B. N. Rep. 82; In re Nunn, 2 Am. B. R. 664; In re Lucius, 10 Am. B. R. 653, 124 Fed. 455, and cases cited.

8a. Lockwood v. Exchange Bank, 10 Am. B. R. 107, 190 U. S. 294; In re Brumbaugh, 12 Am. B. R. 204, 128 Fed. 971; In re Le Vay, 11 Am. B. R. 114, 125 Fed. 990.

9. In re Hill, 2 Am. B. R. 798, 96 Fed. 185, and cases cited.

relative to the setting off of exemptions will be found in § 2 (11). When the exemption has been set apart by the trustee, and he has reported it to the court for its approval, and when approved and the bankrupt's right to it has been finally determined, the property embraced in the exemption ceases to be a part of the assets to be administered by the court in connection with the bankrupt's estate, and the bankrupt court would have no jurisdiction to entertain a plenary suit in equity by a creditor of the bankrupt to reach and subject such exempt property to his claim.<sup>9a</sup> Prior to *Bardes v. Bank*,<sup>10</sup> it was thought in some districts that the still more general power conferred on courts of bankruptcy to "determine controversies" gave the federal courts jurisdiction to pass on the validity of liens on the exempt property; that case, however, clearly negated such a view. Nor has it been superseded by the amendment of § 23-b,<sup>11</sup> which even now has only to do with suits to recover property.<sup>11a</sup> However, exemption laws should be liberally, not narrowly, construed.<sup>12</sup> The burden of proof that the property claimed is exempt is on the bankrupt.<sup>13</sup>

**Trustees' Rights and Duties.**—These are indicated in § 47-a (11), as supplemented by General Order XVII.<sup>14</sup> In brief, if the bankrupt has duly asserted his claim to exemptions,<sup>15</sup> the trustee must estimate and determine the value of the exemptions claimed,<sup>16</sup> and make an itemized report setting them off, within twenty days,<sup>17</sup> whereupon any creditor,<sup>18</sup> but not the bankrupt, may except, and

<sup>9a</sup>. In re Lucius, 10 Am. B. R. 653, 124 Fed. 455; Woodruff v. Cheeves, 5 Am. B. R. 296, 105 Fed. 601; In re Seydel, 9 Am. B. R. 255, 118 Fed. 207.

<sup>10</sup>. 178 U. S. 524, 4 Am. B. R. 163. For an exceptional case, see In re Gordon, 8 Am. B. R. 255, 115 Fed. 445.

<sup>11</sup>. See Section Twenty-three of this work.

<sup>11a</sup>. In re Brumbaugh, 12 Am. B. R. 204, 128 Fed. 971.

<sup>12</sup>. In re Tilden, 1 Am. B. R. 300, 91 Fed. 500.

<sup>13</sup>. In re Turnbull, 5 Am. B. R. 549, 106 Fed. 666; McGahan v.

Anderson, 7 Am. B. R. 641, 113 Fed. 115.

<sup>14</sup>. See "Practice" under this Section, post; and also under Section Forty-seven of this work. See also "Supplementary Forms," post.

<sup>15</sup>. § 7-a (8); Form 1, Schedule B. (5).

<sup>16</sup>. In re Friedrich, 3 Am. B. R. 801, 100 Fed. 284.

<sup>17</sup>. General Order XVII, Form 47. See In re Manning, 7 Am. B. R. 571, 112 Fed. 948. But see also In re Reese, 8 Am. B. R. 411, 115 Fed. 993.

<sup>18</sup>. In re White, 4 Am. B. R. 613, 103 Fed. 774.



the exceptions will be argued before the referee. The trustee having no title,<sup>18a</sup> the appraisers cannot fix the value of the exemptions claimed;<sup>19</sup> their services will, however, often be availed of by the trustee. Indeed, this practice is sometimes sanctioned by district rules. Until the exemptions are fixed, the trustee has the right to possession of the property claimed, and the bankrupt will not be allowed compensation for caring for it.<sup>20</sup> As soon as the claim is determined in favor of the bankrupt, the trustee should at once surrender possession.<sup>21</sup> This general subject is also discussed more in detail later.<sup>22</sup>

### III. RIGHT OF BANKRUPT TO EXEMPTIONS.

**As Affected by Time and Place.**—Domicile here means what it would mean were the question one affecting jurisdiction to adjudge.<sup>23</sup> Thus, the law of the domicile may be different from the law of the forum; as, where the place of business is in one State and the residence in another. Domicile usually connotes personal presence in a fixed and permanent abode.<sup>24</sup> The time both as to existing state statutes and the property claimed is the time of filing the petition.<sup>25</sup> As to existing statutes, this was not so under the law of 1867.

**As Affected by Assertion or Waiver of Claim.**—While an exemption is a matter of right,<sup>26</sup> it, being personal to the bankrupt,<sup>27</sup> must be asserted, or he will be deemed to have waived it. Failure to make a full and fair disclosure of property has been held to deprive the bankrupt of this right.<sup>28</sup> If a voluntary bankrupt, he should

18a. *Lockwood v. Exchange Bank*, 10 Am. B. R. 107, 190 U. S. 294; *Ingram v. Wilson*, 11 Am. B. R. 192, 125 Fed. 913.

19. *In re Grimes*, 2 Am. B. R. 735, 96 Fed. 529. *Contra*, *In re McCutchen*, 4 Am. B. R. 81, 100 Fed. 779.

20. *In re Groves*, 6 Am. B. R. 728.

21. *In re Brown*, 4 Am. B. R. 46, 100 Fed. 441.

22. See "Practice" under this Section, post.

23. § 2 (1).

24. *In re Dinglehoeft Bros.*, 6 Am. B. R. 242, 109 Fed. 866.

25. *In re Groves*, 6 Am. B. R. 728; *In re Miller*, 1 Am. B. R. 647.

26. *In re Brown*, 4 Am. B. R. 46, 100 Fed. 441.

27. *In re Bolinger*, 6 Am. B. R. 171.

28. *In re Waxelbaum*, 4 Am. B. R. 120, 101 Fed. 228; *In re Stephens*, 8 Am. B. R. 53, 114 Fed. 192; *In re Boorstin*, 8 Am. B. R. 89, 114 Fed. 696; *In re Williamson*, 8 Am. B. R. 42. But these cases are all under a peculiar state statute, making the right to exemptions depend on good faith.

assert it in the first instance in Schedule B (5) attached to his petition; if an involuntary bankrupt, in the same schedule when filed after his adjudication.<sup>29</sup> Failure to schedule property thought to be exempt may amount to a concealment preventing a discharge.<sup>30</sup> If the claim was omitted through inadvertence, an amendment asserting it will usually be allowed, even to reach property surrendered by a creditor to the trustee,<sup>31</sup> but not where its purpose is to benefit creditors who hold waivers of exemptions or to avoid a charge of concealment of property.<sup>32</sup>

*Waiver.*—A waiver may arise either from the bankrupt's failure to claim exemptions,<sup>33</sup> or by a general<sup>34</sup> or specific surrender of them. If the latter, the usual method is by a waive-note. In such cases, the waiver is personal to the creditor thus favored, and, if not asserted by him, inures to the benefit of the bankrupt.<sup>35</sup> But a bankrupt may assert his right against a seeming but not actual waiver prior to the bankruptcy.<sup>36</sup> The decisions are not uniform as to the remedy of a creditor holding a waive-note.<sup>37</sup> It has been held that the claim may not be asserted until the note is reduced to judgment;<sup>38</sup> also that such a creditor must look to the exempt property before asserting his claim against the general estate,<sup>39</sup> and even that the waive-note creditor may enforce his debt against the exempt property in the bankruptcy court.<sup>40</sup> The better opin-

29. In re Groves, 6 Am. B. R. 728. Under the Virginia statute this is not enough. In re Garner, 8 Am. B. R. 263, 116 Fed. 200.

30. In re Royal, 7 Am. B. R. 106, 112 Fed. 135.

31. In re Falconer, 6 Am. B. R. 557, 110 Fed. 111; In re White, 11 Am. B. R. 556, 128 Fed. 513.

32. In re Moran, 5 Am. B. R. 472, 105 Fed. 901; affirmed as Moran v. King, 7 Am. B. R. 176, 111 Fed. 730; In re Royal, supra.

33. In re Nunn, 2 Am. B. R. 664; in Georgia a head of a family cannot waive the statutory homestead exemption for the benefit of a creditor. In re Reinhart, 12 Am. B. R. 78, 129 Fed. 510.

34. Compare In re Mayer, 6 Am. B. R. 117, 108 Fed. 599.

35. In re Black, 4 Am. B. R. 776, 104 Fed. 28.

36. In re Osborn, 5 Am. B. R. 111, 104 Fed. 780.

37. The Ray bill of 1902, as amended on the floor of the House, would have settled the question in favor of any person claiming under a waiver, but the Senate struck the provision out.

38. In re Brown, 1 Am. B. R. 256; In re Moore, 7 Am. B. R. 285, 112 Fed. 289. See also In re Tune, 8 Am. B. R. 285, 115 Fed. 906.

39. In re Sisler, 2 Am. B. R. 760, 96 Fed. 402. Compare In re Hopkins, 1 Am. B. R. 209.

40. In re Garden, 1 Am. B. R. 582, 93 Fed. 423; In re Woodruff, 2 Am. B. R. 678, 96 Fed. 317; In re Sisler, supra.

ion is, however, that that court has, save by consent, jurisdiction only to determine the claim made by the bankrupt, thereby leaving the waive-note creditor to pursue his remedy in the state tribunals.<sup>41</sup> The bankrupt's discharge should be withheld until a creditor claiming under a waiver has had time to resort to remedies allowable in state courts.<sup>41a</sup>

**As Affected by the Circumstances of Him Who Claims.**— Questions coming under this head will usually turn on the precedents in the state courts. As to the meaning of "householder" and "head of a family," distinctions are frequently made which seem to have no difference.<sup>42</sup> For cases on the rights of wives to exemptions, see the foot-note.<sup>43</sup> So also for the meaning of "laborer" and "farmer."<sup>44</sup> The conducting of a business under a company name does not affect the right to exemptions.<sup>45</sup> A voluntary bankrupt may not retain his exemption as against the actual and necessary costs of the bankruptcy proceeding, notwithstanding his affidavit of inability to pay.<sup>45a</sup>

**As Affected by the Kind of Property Claimed.**— The cases referable to this subhead are increasingly numerous. A watch is or is not exempt according to the circumstances of the bankrupt; it has been held to be both wearing apparel<sup>46</sup> and an implement of trade.<sup>47</sup>

41. *Woodruff v. Cheeves*, 5 Am. B. R. 296, reversing *In re Woodruff*, supra; *In re Black*, ante; *Sellers v. Bell*, 2 Am. B. R. 529, 94 Fed. 801; *In re Ogilvie*, 5 Am. B. R. 374; *In re Little*, 6 Am. B. R. 681, 110 Fed. 621; *In re Swords*, 7 Am. B. R. 436, 112 Fed. 661; *Lockwood v. Exchange Bank*, 10 Am. B. R. 107, 190 U. S. 294; *Ingram v. Wilson*, 11 Am. B. R. 192, 125 Fed. 913; *Bell v. Dawson*, 12 Am. B. R. 159 (Ga. Sup.). A valuable contribution to the discussion of this question will be found in *In re Tune*, 8 Am. B. R. 285, 115 Fed. 906.

41a. *Ingram v. Wilson*, 11 Am. B. R. 192, 125 Fed. 913; *Bell v. Dawson*, 12 Am. B. R. 159 (Ga. Sup.).

42. *In re Morrison*, 6 Am. B. R. 488, 110 Fed. 734 (and foot-note); *In re Stokes*, 4 Am. B. R. 560; *In re Jamieson*, 6 Am. B. R. 601; *In re*

*Rafferty*, 7 Am. B. R. 415; *In re Hostin*, 7 Am. B. R. 362.

43. *In re Griffith*, 1 N. B. N. 546; *In re Pope*, 3 Am. B. R. 525, 98 Fed. 722. For "widow's allowance," see *In re Seabolt*, 8 Am. B. R. 57, 113 Fed. 766.

44. *In re Hindman*, 5 Am. B. R. 20, 104 Fed. 331; *In re Fly*, 6 Am. B. R. 550.

45. *In re Carpenter*, 6 Am. B. R. 465, 109 Fed. 558.

45a. *In re Hines*, 9 Am. B. R. 27, 117 Fed. 790; *In re Bean*, 4 Am. B. R. 53, 100 Fed. 262.

46. *In re Jones*, 3 Am. B. R. 259; *In re Caswell*, 6 Am. B. R. 718. Contra, *In re Turnbull*, 5 Am. B. R. 231; *In re Everleth*, 12 Am. B. R. 236, 129 Fed. 620.

47. *In re Collier*, 7 Am. B. R. 131, 111 Fed. 503.

Even a diamond stud has been declared exempt, though this case would seem treacherous authority.<sup>48</sup> The tools and implements of a bankrupt's trade are exempt in most of the States;<sup>49</sup> so are his household furniture and wearing apparel to limited amounts. A seat in a stock exchange is not exempt unless made so by statute.<sup>49a</sup> In Vermont, an unbroken horse is so far a domestic animal as to be exempt,<sup>50</sup> but a race horse is not.<sup>51</sup> Hard and fast rules are not deducible from the cases. Each claim will be determined on its own facts.<sup>52</sup>

*Homesteads.*—Here again resort must be had to the decisions of the state courts.<sup>53</sup> It is a common rule, however, that actual designation and occupancy are essential to the right;<sup>54</sup> but it seems a homestead may be abandoned and one more valuable be occupied even within the four months period.<sup>55</sup> Homestead exemptions cannot, therefore, be allowed in vacant property.<sup>56</sup> A bankrupt may have his homestead in a store, but will not be permitted to claim a homestead where he merely stores his goods.<sup>57</sup> A woman, doing business as a *feme sole*, though living with her husband, has been allowed a homestead,<sup>58</sup> and it has been held that a homestead set apart as alimony for the benefit of a wife and child cannot be distributed among her creditors in bankruptcy.<sup>58a</sup> A tenant by the curtesy has sufficient possession to sustain a homestead,<sup>59</sup> but not

48. In re Smith, 3 Am. B. R. 140.

49. In re Osborn, 5 Am. B. R. 111, 104 Fed. 780.

49a. Page v. Edwards, 9 Am. B. R. 277, 187 U. S. 596; In re Neimann, 10 Am. B. R. 739, 124 Fed. 738.

50. In re Alfred, 1 Am. B. R. 243.

51. In re Libby, 4 Am. B. R. 615, 103 Fed. 776.

52. Thus, see In re Thompson, 8 Am. B. R. 283, 115 Fed. 924.

53. In re Rhodes, 6 Am. B. R. 173, 109 Fed. 117; In re Tollett, 5 Am. B. R. 404, 106 Fed. 866; In re Carmichael, 5 Am. B. R. 551, 108 Fed. 789; In re Stone, 8 Am. B. R. 416, 116 Fed. 35; In re Manning, 10 Am. B. R. 498, 123 Fed. 180; In re Wilson, 10 Am. B. R. 522, 123 Fed. 20, 50 C. C. A. 100, as to the effect of the payment of a mortgage upon a homestead

from the proceeds of the sale of the bankrupt's grocery business shortly before bankruptcy.

54. In re Buelow, 3 Am. B. R. 389, 98 Fed. 86; In re Gibbs, 4 Am. B. R. 619, 103 Fed. 782.

55. Huenergardt v. Brittain Dry Goods Co., 8 Am. B. R. 341, 116 Fed. 31; In re Johnson, 9 Am. B. R. 257, 118 Fed. 312; In re Irvin, 9 Am. B. R. 689, 120 Fed. 733.

56. In re Duerson, Fed. Cas. 4,117; In re Hatch, 2 Am. B. R. 36.

57. In re Dawley, 2 Am. B. R. 496, 94 Fed. 795.

58. Richardson v. Woodward, 5 Am. B. R. 94, 104 Fed. 873.

58a. In re Le Claire, 10 Am. B. R. 733, 124 Fed. 654.

59. In re Marquette, 4 Am. B. R. 623, 103 Fed. 117.

a mere remainderman.<sup>60</sup> Crops on a homestead are or are not exempt according to circumstances.<sup>61</sup> It would seem that the jurisdiction of the court of bankruptcy over homestead property extends even to the sale of it for certain purposes.<sup>62</sup> For cases on what constitutes in different States an abandonment of a homestead, see the foot-note.<sup>63</sup>

*Insurance Policies.*—Insurance policies are not always exempt under the laws of the States. Where they are, the question at once arises: How far is § 6 of the law limited by § 70-a (5)? The cases seem to turn on whether the policy is of such a nature as to have a present cash surrender value. If it has not such value, or if the wife must consent to its transfer, it seems that it is not an asset that passes to the trustee, and may be exempt.<sup>64</sup> The Circuit Court of Appeals for the Eighth Circuit has even held that the only test is whether the policy is exempt by the state law; in other words, that the provisions of § 70-a (5) are not a limitation of § 6.<sup>65</sup> The same court in the Ninth Circuit has held the opposite, provided the policy is payable to the bankrupt;<sup>66</sup> the rule in the Seventh Circuit is much the same.<sup>67</sup> This seems more equitable, as well as clearly within the rules of statutory construction.

*Pension Money.*—The federal law protects pension money from seizure by levy and sale;<sup>68</sup> the States sometimes protect it after it has been transformed into other property.<sup>69</sup> It is exempt everywhere while in transit from the government to the pensioner, or

60. In re Fitzsimmons, 2 N. B. N. Rep. 453.

61. In re Coffman, 1 Am. B. R. 530, 93 Fed. 422; In re Hoag, 3 Am. B. R. 290, 97 Fed. 543; In re Daubner, 3 Am. B. R. 368.

62. In re Gibbs, 4 Am. B. R. 619, 103 Fed. 782, In re Oderkirk, 4 Am. B. R. 617, 103 Fed. 779.

63. (Texas) In re Harrington, 3 Am. B. R. 639, 99 Fed. 390; (Iowa) In re Pope, 3 Am. B. R. 525, 98 Fed. 722; (Missouri) In re Lynch, 1 Am. B. R. 245; (Wisconsin) In re Mayer, 6 Am. B. R. 117, 108 Fed. 599; In re Flannagan, 9 Am. B. R. 140, 117 Fed. 695.

64. In re Lange, 1 Am. B. R. 189, 91 Fed. 361; In re Buelow, 3 Am. B. R. 389, 98 Fed. 86; In re Hernich, 1 Am. B. R. 713. Compare In re Shingluff, 5 Am. B. R. 76, 106 Fed. 154.

65. Steele v. Buel, 5 Am. B. R. 165, 104 Fed. 968. See also Pulsifer v. Hussey, 9 Am. B. R. 657, 97 Me. 434, 54 Atl. 1076.

66. In re Scheld, 5 Am. B. R. 102, 104 Fed. 870; In re Holden, 7 Am. B. R. 615, 114 Fed. 650.

67. In re Welling, 7 Am. B. R. 340, 113 Fed. 189.

68. U. S. R. S., § 4747.

69. Thus, § 1393, N. Y. Code of Civil Procedure.

## Partnership Assets.

[§ 6.]

in the form in which it was paid to him;<sup>70</sup> and probably if it could be traced into some other kind of property and identified.<sup>71</sup> The opposite rule pertains, however, where the pensioner has embarked it in business, or where it has been invested in land from which at the time of his bankruptcy he has, through a mortgage thereon, already withdrawn more than the land cost.<sup>72</sup>

*Partnership Assets.*—Whether the members of a bankrupt firm can claim exemptions from its partnership assets depends on the decisions of the state courts.<sup>73</sup> On principle, they cannot, the partnership being an entity, and the partners having no interest in the assets until all its creditors are paid.<sup>74</sup> Such claims have, under the present law, been denied in Arkansas, in New Jersey, in Maryland, and in South Dakota.<sup>75</sup> On the other hand, it has been held that such claims may be asserted, if each partner shall consent thereto,<sup>76</sup> especially where there are no individual estates from which exemptions may be taken,<sup>77</sup> and even that, fraud being absent, partners may before bankruptcy so sever the joint estate as to permit each of them to claim their exemptions, though on appeal this severance was not approved or even thought necessary.<sup>78</sup> But where there is no transfer, but a mere abandonment by one partner of his interest, an exemption will not be allowed out of partnership assets to the other member of the firm.<sup>79</sup> Several of the cases cited in the foot-notes contain summaries of decisions both in the federal and in the highest state courts, in particular *In re Camp*.

<sup>70</sup>. *In re Bean*, 4 Am. B. R. 53, 100 Fed. 262.

<sup>71</sup>. *In re Stout*, 6 Am. B. R. 505, 109 Fed. 794; *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550.

<sup>72</sup>. *In re Ellithorpe*, 5 Am. B. R. 681; affirmed, s. c., 7 Am. B. R. 18, 111 Fed. 163.

<sup>73</sup>. *In re Camp*, 1 Am. B. R. 165, 91 Fed. 745; *In re Stevenson & King*, 2 Am. B. R. 230, 93 Fed. 789.

<sup>74</sup>. *In re Beauchamp*, 101 Fed. 106; *In re Mosier*, 7 Am. B. R. 268, 112 Fed. 138.

<sup>75</sup>. *In re Meriwether* (Ark.), 5 Am. B. R. 435, 107 Fed. 102; *In re Demarest* (N. J.), 6 Am. B. R. 232, 110 Fed. 638; *In re Beauchamp* (Md.),

*supra*; *In re Lentz* (S. Dak.), 2 N. B. N. Rep. 190, 97 Fed. 486.

<sup>76</sup>. *In re Grimes*, (N. C.), 2 Am. B. R. 160, 94 Fed. 800; *In re Nelson* (Wis.), 2 Am. B. R. 556; *In re Friedrich* (Wis.), 95 Fed. 282.

<sup>77</sup>. *In re Stevenson*, 2 Am. B. R. 230, 93 Fed. 789; *In re Duguid*, 3 Am. B. R. 794, 100 Fed. 274; *In re Wilson*, 4 Am. B. R. 260, 101 Fed. 572; *In re Steed*, 6 Am. B. R. 73, 107 Fed. 682; *In re Seabolt*, 8 Am. B. R. 57, 113 Fed. 766.

<sup>78</sup>. *In re Friedrich* (Wis.), 3 Am. B. R. 800, 100 Fed. 284, modifying s. c., 95 Fed. 282; *In re Lockerby* (Minn.), 3 N. B. N. Rep. 7.

<sup>79</sup>. *In re Bergman* (Ill.), 2 N. B. N. Rep. 806. See also *In re Mosier*, *supra*.

## § 6.] Property Fraudulently Conveyed or Concealed.

*Unpaid Purchase Money.*—It is sometimes provided by state law that an exemption from execution shall not extend to a process issued upon a demand for the purchase price of the estate claimed as exempt.<sup>79a</sup> Any creditor of a bankrupt may avail himself of this exception.<sup>79b</sup>

## IV. MISCELLANEOUS.

**In Property Fraudulently Conveyed or Concealed.**—In some States, the bankrupt is denied his exemptions, if he has been guilty of a fraud on creditors generally or has intentionally transferred or concealed any portion of his property, whether exempt or not;<sup>80</sup> this is probably due to local statutes. The rule, however, is that, exemptions, being a matter of right, should not be denied, even if asserted in property fraudulently transferred or concealed and later recovered by the trustee.<sup>81</sup> But where the bankrupt has scheduled property out of which he claims exemptions, and the trustee later recovers other property which had been preferentially transferred, the former will not be permitted to abandon his previous claim and assert it against such property.<sup>82</sup> Where, however, the alleged fraudulent transaction involves the sale of non-exempt property, and the use of the avails in reducing an incumbrance against an exempt homestead, it will not avail.<sup>83</sup> A general assignment is not sufficiently fraudulent to come within the rules previously stated.<sup>84</sup>

<sup>79a</sup>. In re Schechter, 9 Am. B. R. 729; Cannon v. Dexter Broom & M. Co., 9 Am. B. R. 724, 120 Fed. 657, 57 C. C. A. 327.

<sup>79b</sup>. In re Campbell, 10 Am. B. R. 723, 124 Fed. 417.

<sup>80</sup>. McDowell v. McMurria, 107 Ga. 812, 73 Am. St. Rep. 155; In re Waxelbaum, 4 Am. B. R. 120, 101 Fed. 228; In re Tollett, 5 Am. B. R. 305, 105 Fed. 425; overruled in s. c., 5 Am. B. R. 404, 106 Fed. 866; In re Long, 8 Am. B. R. 591, 116 Fed. 113; In re Duffy, 9 Am. B. R. 358; In re Yost, 9 Am. B. R. 153, 117 Fed. 792. And see foot-note 28, ante.

<sup>81</sup>. In re Park, 4 Am. B. R. 432, 102 Fed. 602; Wilcox v. Hawley, 31 N. Y. 648; In re Noll, 2 N. B. N. Rep.

789; In re Buckingham, 2 N. B. N. Rep. 617; In re Rothschild, 6 Am. B. R. 43. Thus even in Georgia where the "good faith" rule is in the local statute: In re Talbott, 8 Am. B. R. 427, 116 Fed. 417; affirmed, sub nom. Bashinski v. Talbott, 9 Am. B. R. 513, 119 Fed. 337, 56 C. C. A. 241.

<sup>82</sup>. In re White, 6 Am. B. R. 451, 109 Fed. 635; In re Coddington, 11 Am. B. R. 122, 126 Fed. 891. Contra, In re Falconer, 6 Am. B. R. 557, 110 Fed. 111. See also In re Evans, 8 Am. B. R. 730, 116 Fed. 909.

<sup>83</sup>. In re Boston, 3 Am. B. R. 388, 98 Fed. 587.

<sup>84</sup>. In re Tilden, 1 Am. B. R. 300, 91 Fed. 500; In re Noll, ante.

**In Incumbered Property.**—All valid liens are preserved by the statute.<sup>85</sup> Under principles already discussed, a court of bankruptcy has no jurisdiction to determine either the existence or priority of liens on exempt property, unless such property is worth more than the exemption allowed by the state statute.<sup>86</sup> In many States the bankrupt has an absolute right to selection in specie; and, it seems, he can insist on it even though he thereby destroys the surplus value belonging to the trustee.<sup>87</sup> Where the lien is dissolved by the bankruptcy as that of an execution following a judgment recovered within four months, the bankrupt is entitled to his exemption in the property which was affected by such lien,<sup>88</sup> or, if it has been sold, from the proceeds of the sale. As between incumbered and unincumbered property exempt in specie, the bankrupt will be given the unincumbered. But where the debtor, within four months of the bankruptcy, gave a mortgage on his stock in trade, otherwise exempt, but without specifying the exemption, the mortgage is a preference and will not be declared good to the extent of the exemption allowance, because a claim to exemption is personal to the bankrupt and must be made by him.<sup>89</sup> It has even been held, on a strict construction of § 64-a, that taxes on an exempt homestead must be paid out of the general fund.<sup>90</sup> This decision rests on a strict construction of the law. The rule seems well settled in those States that grant exemptions in specie, provided the property, with taxes paid, is not worth the amount allowed.

**Practice.**<sup>91</sup>—A difficulty arises when the bankrupt claims exemptions and no creditors appear at the first meeting. By General Order XV, a trustee may be and usually is dispensed with. This leaves the court without the officer whose duty it is to report on and set

85. § 67-d; *In re Thomas*, 3 Am. B. R. 99, 96 Fed. 828.

86. *In re Hopkins*, 1 Am. B. R. 209; *In re Grimes*, 2 Am. B. R. 730; *In re Hatch*, 4 Am. B. R. 349, 102 Fed. 280; *In re Wells*, 5 Am. B. R. 308, 105 Fed. 762; *In re Durham*, 4 Am. B. R. 760, 104 Fed. 231. But see *In re Tune*, 8 Am. B. R. 285, 115 Fed. 906.

87. *In re Grimes*, *supra*.

88. *In re Tune*, *supra*.

89. *In re Schuller*, 6 Am. B. R. 278, 108 Fed. 591.

90. *In re Tilden*, *ante*; *In re Baker*, 1 Am. B. R. 526.

91. For practice on amending schedules to show a claim to exemptions, see *ante*, sub nom.: "As Affected by Assertion or Waiver of Claim."



off the exemptions. It is thought that in such cases the judge or referee may try the validity of the claim summarily. In some of the districts this practice is sanctioned by rule.<sup>92</sup> Where such a practice is followed, the claiming bankrupt should at least be required to file an affidavit giving facts in addition to those stated in his Schedule B (5), and such affidavit should show him clearly entitled under the state law to the property claimed. If the bankrupt inadvertently omits from his schedule a valid claim of exemption an amendment will be permitted upon satisfactory proof of the mistake.<sup>92a</sup> The following rulings on practice will be found valuable: The claim must be clearly stated, especially if of property in specie;<sup>93</sup> while, as a rule, the trustee has no power to sell the exempt property, where it is inseparable from other property, he must sell it,<sup>94</sup> the expense of sale to be borne by the general estate,<sup>95</sup> and the bankrupt is then entitled to his *pro rata* of the proceeds;<sup>96</sup> but, in Pennsylvania, after a sale of property not exempt, a bankrupt, even though entitled to an exemption in cash in the first instance, cannot assert his claim against the cash proceeds of such sale;<sup>97</sup> a trustee first determines what is exempt,<sup>98</sup> but this determination is not final,

92. Thus, in the Erie County District of the Western District of New York, Rule 15 (1) provides as follows:

"1. Where there is no trustee appointed, the exemptions claimed by the bankrupt may be set off to him at the time the order to that effect is signed, and, in that event, the following clause shall be inserted in Form No. 27:

"And it appearing that the said bankrupt is entitled to the exemptions claimed in the schedules accompanying the petition herein, it is further ordered that the property claimed in said schedules, being exempt pursuant to Section 1390 of the Code of Civil Procedure of the State of New York, be, and the same is hereby, set off to the said ....., the bankrupt."

"Prior to asking for such order the bankrupt shall satisfy the referee, by affidavit or otherwise, as to the value of such exemptions, and that he is entitled to the same."

92a. In re White, 11 Am. B. R. 556, 128 Fed. 513; In re Duffy, 9 Am. B. R. 358, 118 Fed. 926.

93. In re Wilson, 6 Am. B. R. 287, 108 Fed. 197.

94. In re Oderkirk, 4 Am. B. R. 617, 103 Fed. 779.

95. In re Hopkins, 4 Am. B. R. 619, 103 Fed. 781.

96. In re Richard, 2 Am. B. R. 506, 94 Fed. 633; In re Kane, 11 Am. B. R. 533, 127 Fed. 552; In re Le Vay, 11 Am. B. R. 114, 125 Fed. 913, in which case the bankrupt was permitted to share in the proceeds of the sale of perishable property sold by a receiver under the direction of the court; In re Stein, 12 Am. B. R. 384, 130 Fed. 629.

97. In re Haskin, 6 Am. B. R. 485, 109 Fed. 789.

98. In re Friedrich, 3 Am. B. R. 801, 100 Fed. 284; his report should be itemized, In re Manning, 7 Am. B. R. 571, 112 Fed. 948.

for creditors may file exceptions within twenty days, and the referee then decides;<sup>99</sup> a referee's findings of fact on a claim to exemptions will not be disturbed unless palpably erroneous;<sup>100</sup> but where a trustee was dispensed with, the judge cannot review the decision of the referee.<sup>101</sup> It seems to follow from the above that a bankrupt's sole remedy is to review the referee's decision, while a creditor may except both to the trustee's set-off and to the referee's action thereon.<sup>101a</sup> The practice on exemptions is also discussed in the previous paragraphs of this section. It is simple and should usually be summary. Appropriate forms will be found in the proper place, *post*.

# V. TABLE OF CASES ON EXEMPTIONS UNDER THE PRESENT LAW, ARRANGED BY STATES.<sup>102</sup>

## Alabama:

- Garden, In re, 1 Am. B. R. 582, 93 Fed. 423; reversed in In re Moore, 7 Am. B. R. 285, 112 Fed. 289.
- Hopkins, In re, 1 Am. B. R. 209.
- Sellers v. Bell, 2 Am. B. R. 529, 94 Fed. 801.
- Tune, In re, 8 Am. B. R. 285, 115 Fed. 906.

## Arkansas:

- Durham, In re, 4 Am. B. R. 760, 104 Fed. 231.
- Falconer, In re, 6 Am. B. R. 557, 110 Fed. 111.
- Meriwether, In re, 5 Am. B. R. 435, 107 Fed. 102.
- Morrison, In re, 6 Am. B. R. 488, 110 Fed. 734.
- Overstreet, In re, 2 Am. B. R. 486.
- Park, In re, 4 Am. B. R. 432, 102 Fed. 602.
- Stone, In re, 8 Am. B. R. 416, 116 Fed. 35.

<sup>99</sup>. In re White, 4 Am. B. R. 613, 103 Fed. 774: but the issue may be certified to the judge without decision. McGahan v. Anderson, 7 Am. B. R. 641, 113 Fed. 115. Until exceptions are filed to the trustee's report there is no issue on the question whether the exemption is properly allowable. In re Campbell, 10 Am. B. R. 723, 124 Fed. 417.

<sup>100</sup>. In re Waxelbaum, 4 Am. B. R. 120, 101 Fed. 228.

<sup>101</sup>. In re Smith, 2 Am. B. R. 190, 93 Fed. 791.

<sup>101a</sup>. But see In re Ellis, 10 Am. B. R. 754, holding that the bankrupt also may except to the trustee's report on exempt property.

<sup>102</sup>. This table includes most, if not all, the cases reported in Vols. I to VIII, inclusive, of the American Bankruptcy Reports, and, It is thought, in Vols. 88 to 116, inclusive, of the Federal Reporter.

*California:*

- Diller, In re, 4 Am. B. R. 45, 100 Fed. 931.  
 Fly, In re, 6 Am. B. R. 550, 110 Fed. 141.  
 Hindman, In re, 5 Am. B. R. 20, 104 Fed. 331.  
 Petersen, In re, 2 Am. B. R. 630, 95 Fed. 417.  
 Scheld, In re, 5 Am. B. R. 102, 104 Fed. 870.

*Colorado:*

- Prager, In re, 8 Am. B. R. 356.

*Florida:*

- Carpenter, In re, 6 Am. B. R. 465, 109 Fed. 558.

*Georgia:*

- Boorstin, In re, 8 Am. B. R. 89, 114 Fed. 696.  
 Camp, In re, 1 Am. B. R. 165, 91 Fed. 745.  
 Evans v. Rounsaville, 8 Am. B. R. 236.  
 Hill, In re, 2 Am. B. R. 798, 96 Fed. 185.  
 Lynch, In re, 4 Am. B. R. 262, 101 Fed. 579.  
 Nunn, In re, 2 Am. B. R. 664.  
 Ogilvie, In re, 5 Am. B. R. 374.  
 Rothschild, In re, 6 Am. B. R. 2.  
 Stephens, In re, 8 Am. B. R. 53, 114 Fed. 192.  
 Swords, In re, 7 Am. B. R. 436, 112 Fed. 661.  
 Talbott, In re, 8 Am. B. R. 427, 116 Fed. 417.  
 Thompson, In re, 8 Am. B. R. 283, 115 Fed. 924.  
 Waxelbaum, In re, 4 Am. B. R. 120, 101 Fed. 228.  
 West, In re, 8 Am. B. R. 564, 116 Fed. 767.  
 Williamson, In re, 8 Am. B. R. 42, 114 Fed. 190.  
 Woodruff, In re, 2 Am. B. R. 678, 96 Fed. 317; reversed on  
 appeal as Woodruff v. Cheeves, 5 Am. B. R. 296, 105 Fed.  
 601.

*Indiana:*

- Beals, In re, 8 Am. B. R. 639, 116 Fed. 530.

*Iowa:*

- Hatch, In re, 4 Am. B. R. 349, 102 Fed. 280.  
 Lange, In re, 1 Am. B. R. 186; reversed on review as Lange,  
 In re, 1 Am. B. R. 189, 91 Fed. 361.  
 Little, In re, 6 Am. B. R. 681, 110 Fed. 621.  
 Pope, In re, 3 Am. B. R. 525, 98 Fed. 722.  
 Rafferty, In re, 7 Am. B. R. 415.  
 Steele & Co., In re, 3 Am. B. R. 549, 98 Fed. 78; reversed on  
 appeal as Steele v. Buel, 5 Am. B. R. 165, 104 Fed. 968.  
 Tilden, In re, 1 Am. B. R. 300, 91 Fed. 500.

*Kansas:*

Parker, In re, 1 Am. B. R. 708.

*Kentucky:*

Carmichael, In re, 5 Am. B. R. 551, 108 Fed. 789.

*Maryland:*

Beauchamp, In re, 4 Am. B. R. 151, 101 Fed. 106.

*Massachusetts:*

Anderson, In re, 6 Am. B. R. 555, 110 Fed. 741.

Collier, In re, 7 Am. B. R. 131, 111 Fed. 503.

Turnbull, In re, 5 Am. B. R. 231; affirmed on review as Turnbull, In re, 5 Am. B. R. 549, 106 Fed. 666.

*Michigan:*

Hatch, In re, 2 Am. B. R. 36.

*Missouri:*

Hostin, In re, 7 Am. B. R. 362.

Lynch, In re, 1 Am. B. R. 245.

Miller, In re, 1 Am. B. R. 647.

Stout, In re, 6 Am. B. R. 505, 109 Fed. 794.

White, In re, 6 Am. B. R. 451, 109 Fed. 635.

*New York:*

Ellithorpe, In re, 5 Am. B. R. 681; affirmed on review as Ellithorpe, In re, 7 Am. B. R. 18, 111 Fed. 163.

Lewensohn, In re, 3 Am. B. R. 594, 99 Fed. 73.

Osborn, In re, 5 Am. B. R. 111, 104 Fed. 780.

Stokes, In re, 4 Am. B. R. 560.

*New Jersey:*

Demarest, In re, 6 Am. B. R. 232, 110 Fed. 638.

*North Carolina:*

Dingelhof Bros., In re, 6 Am. B. R. 242, 109 Fed. 866.

Duguid, In re, 3 Am. B. R. 794, 100 Fed. 274.

Evans, In re, 8 Am. B. R. 730, 116 Fed. 909.

Grimes, In re, 2 Am. B. R. 160, 94 Fed. 800.

Grimes, In re (II), 2 Am. B. R. 610; modified on review as Grimes, In re, 2 Am. B. R. 730, 96 Fed. 529.

Richard, In re, 2 Am. B. R. 506, 94 Fed. 633.

Royal, In re, 7 Am. B. R. 106, 112 Fed. 135.

*North Carolina* — Continued:

- Seabolt, In re, 8 Am. B. R. 57, 113 Fed. 766.  
Steed & Curtis, In re, 6 Am. B. R. 73, 107 Fed. 682.  
Stevenson & King, In re, 2 Am. B. R. 230, 93 Fed. 789.  
Wilson, In re, 4 Am. B. R. 260, 101 Fed. 571.  
Woodard, In re, 2 Am. B. R. 692, 95 Fed. 955.

*Oregon:*

- Daubner, In re, 3 Am. B. R. 368, 96 Fed. 805.

*Ohio:*

- Groves, In re, 6 Am. B. R. 728.  
Rhodes, In re, 6 Am. B. R. 173, 109 Fed. 117.

*Pennsylvania:*

- Black, In re, 4 Am. B. R. 776, 104 Fed. 289.  
Bolinger, In re, 6 Am. B. R. 171, 108 Fed. 374.  
Brown, In re, 1 Am. B. R. 256; modified on review as Brown,  
In re, 4 Am. B. R. 46, 100 Fed. 441.  
Haskin, In re, 6 Am. B. R. 485, 109 Fed. 789.  
Hoover, In re, 7 Am. B. R. 330, 113 Fed. 136.  
Jackson, In re, 8 Am. B. R. 594, 116 Fed. 46.  
Long, In re, 8 Am. B. R. 591, 116 Fed. 113.  
Manning, In re, 7 Am. B. R. 571, 112 Fed. 948.  
Myers, In re, 4 Am. B. R. 536, 102 Fed. 869.

*Rhode Island:*

- Caswell, In re, 6 Am. B. R. 718.  
Jamieson, In re, 6 Am. B. R. 601.

*South Carolina:*

- Anderson, In re, 4 Am. B. R. 640, 103 Fed. 854; modified on  
appeal as McGahan v. Anderson, 7 Am. B. R. 641, 113 Fed.  
115.  
McCutchen, In re, 4 Am. B. R. 81, 100 Fed. 779.

*Texas:*

- Baker, In re, 1 Am. B. R. 526.  
Coffman, In re, 1 Am. B. R. 530, 93 Fed. 422.  
Harrington, In re, 3 Am. B. R. 639, 99 Fed. 390.  
Smith, In re, 2 Am. B. R. 190, 93 Fed. 791.  
Smith (II), In re, 3 Am. B. R. 140, 96 Fed. 832.

*Tennessee:*

Tollett, In re, 5 Am. B. R. 305, 105 Fed. 425; affirmed on appeal as Tollett, In re, 5 Am. B. R. 404, 106 Fed. 866.

*Vermont:*

Alfred, In re, 1 Am. B. R. 243.  
Bean, In re, 4 Am. B. R. 53, 100 Fed. 262.  
Dawley, In re, 2 Am. B. R. 496, 94 Fed. 795.  
Gordon, In re, 8 Am. B. R. 255, 115 Fed. 445.  
Hopkins, In re, 4 Am. B. R. 619, 103 Fed. 781.  
Libby, In re, 4 Am. B. R. 615, 103 Fed. 776.  
Marquette, In re, 4 Am. B. R. 623, 103 Fed. 777.  
Mosier, In re, 7 Am. B. R. 268, 112 Fed. 138.  
Oderkirk, In re, 4 Am. B. R. 617, 103 Fed. 770.  
White, In re, 4 Am. B. R. 613, 103 Fed. 774.

*Virginia:*

Garner, In re, 8 Am. B. R. 263, 115 Fed. 200.  
Moran, In re, 5 Am. B. R. 472, 105 Fed. 901; affirmed on appeal as Moran v. King, 7 Am. B. R. 176, 111 Fed. 730.  
Richardson v. Woodward, In re, 5 Am. B. R. 94, 104 Fed. 873.  
Sisler, In re, 2 Am. B. R. 760, 96 Fed. 402.  
Tobias, In re, 4 Am. B. R. 555, 103 Fed. 68.  
Wilson, In re, 6 Am. B. R. 287, 108 Fed. 197.

*Wisconsin:*

Friedrich, In re, 95 Fed. 282; modified on appeal as Friedrich, In re, 3 Am. B. R. 801, 100 Fed. 284.  
Hoag, In re, 3 Am. B. R. 290, 97 Fed. 543.  
Jones, In re, 3 Am. B. R. 259, 97 Fed. 773.  
Mayer, In re, 6 Am. B. R. 117, 108 Fed. 599.  
Nelson, In re, 2 Am. B. R. 556.  
Peterson, In re, 1 Am. B. R. 254.  
Schuller, In re, 6 Am. B. R. 278, 108 Fed. 591.

*Washington:*

Buelow, In re, 3 Am. B. R. 389, 98 Fed. 86.  
Thomas, In re, 3 Am. B. R. 99, 96 Fed. 828.  
Holden, In re, 12 Am. B. R. 96, 127 Fed. 980.

## SECTION SEVEN.

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### DUTIES OF BANKRUPTS.

§ 7. **Duties of Bankrupts.**— *a* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

*Provided, however,* That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge

thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

**Analogous provisions:** In U. S.: *As to* (5), Act of 1867, § 14, R. S., § 5051; *As to* (8), Act of 1867, §§ 11, 26, 42 (as amended by Act of July 27, 1868), R. S., §§ 5014, 5015, 5016, 5017, 5020, 5030, 5044; Act of 1841, § 1; *As to* (9), Act of 1867, § 26, R. S., § 5086; Act of 1800, §§ 18, 52.

**In Eng.:** *As to* (8), Act of 1883, § 16; *As to* (9), Act of 1883, § 17; See also General Rules 184 to 189A, and 217, 218.

**Cross references:** **To the law:** *As to* (1), § 14-b, 55-a; *As to* (2), §§ 1 (4), 2 (4) (13) (14) (15) (16), 14-b (6); *As to* (3), § 57; *As to* (6) and (7), § 29; *As to* (8), §§ 18-a, 39-a (6), 59-a-b, 70-a; *As to* (9), §§ 14-b (6), 21, 29, 38-a, 39-a, 41; *Proviso clause*, R. S., § 876.

**To the General Orders:** V, IX, X, XI, XII, XXII.

**To the Forms:** Nos. 1, 14, 28, 29.

## SYNOPSIS OF SECTION.

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*Illustrative Cases.*

**Subs. a (2).** Obedience to Lawful Orders.

*Punishment for Refusal.*

**Subs. a (3) (7).** Examination of Claims and Notification of Trustee of Proof of False Claims.

**Subs. a (4) (5).** Execution and Delivery of Papers.

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§ 7a (1).]      Miscellaneous Duties; Attendance at Meetings.

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### III. Subs. a (9). Public Examination of Bankrupt.

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### I. MISCELLANEOUS DUTIES.

**Subs. a (1). Attendance on Meetings.**—Four things should be noted: (a) The bankrupt is not obliged to attend the first or any other meeting of creditors, unless ordered to do so; (b) if his home or usual place of business is more than one hundred and fifty miles from the place of meeting, he cannot be required to attend save for cause shown; (c) if ordered to attend a meeting other than in the place of his residence, he is entitled to actual expenses out of the estate; and (d) that, none of these limitations seeming to apply to a hearing on discharge, he must attend such a hearing, wherever it is and at his own expense, even though not ordered to do so. There was no like clause in the Act of 1867.

*Practice.*—By Form No. 14, the bankrupt is at the time of the adjudication ordered to appear before the referee on a day certain. This in actual practice should be forthwith, since, under the words of the form and of General Order XII (1), there is doubt whether the referee acquires jurisdiction until he does so. In some districts, this day is fixed as that for the first meeting of creditors and, if so, the bankrupt must attend. The more common practice, however, is to notify the attorney in charge to produce the bankrupt at the time of the first meeting, a practice somewhat loose, as not probably amounting to such an order as to require the bankrupt's presence under this subsection, or sufficient to predicate thereon a report for contempt under § 41-a (1) and b. If once ordered to attend a meeting, he must attend every continuance of the meeting; but a referee will not permit the bankrupt to be harassed by repeated applications for adjournments. When the presence of the bankrupt

seems not likely to be required at a continuance or at subsequent continuances, he should be excused and a minute made of such order.<sup>1</sup>

*Illustrative Cases.*—Under the former law, it was held that, in the absence of an order to attend, the bankrupt might stay away;<sup>2</sup> also, that, for sickness or other good cause, he might be excused;<sup>3</sup> and that he must, when ordered, attend a meeting called to consider a proposed composition.<sup>4</sup> Under the present law, the cases specified in the foot-note,<sup>5</sup> will be found suggestive, especially *Eagles v. Crisp*, which is a brief monograph on practice at meetings of creditors, though its holding that a bankrupt is required to be present at the first meeting, apparently whether ordered to do so or not, may be questioned.

**Subs. a (2). Obedience to Lawful Orders.**—“Bankrupt” includes any person against whom a petition has been filed.<sup>6</sup> Alleged bankrupts are, therefore, charged with the duty of obeying lawful orders.<sup>7</sup> What are lawful orders depends on many facts, such as jurisdiction, and the like, and such orders may be concerning any of the thousand and one acts which under the law a bankrupt and his creditors or other persons may be required to do or to refrain from doing. Thus, a bankruptcy court may make an order directing a bankrupt to turn over to his trustee goods found to be in his possession and under his control.<sup>7a</sup> It is not for the bankrupt or his counsel to determine whether the order made is lawful.<sup>8</sup> It stands until it is modified or withdrawn by the court.<sup>9</sup> This may be accomplished by a special appearance and motion to that end, or the court may act *proprio motu*. It has been held that the order need not necessarily be in writing;<sup>10</sup> indeed, referees often give oral directions to the bankrupt which, if properly noted on their record books, are as effective for all purposes (including a proceeding to punish for contempt) as if reduced to writing and actually served.

1. The above suggestions are based on the practice of the Erie County District of the Western District of New York.

2. In re Dumahaut, Fed. Cas.

4,124.

3. In re Carpenter, Fed. Cas. 2,427.

4. In re Scott et al., Fed. Cas. 12,519.

5. *Eagles v. Crisp*, 3 Am. B. R. 733, 99 Fed. 695; In re Tudor, 4 Am. B. R. 78, 100 Fed. 796; In re Groves,

6 Am. B. R. 732; In re Parker, 1 Am. B. R. 615.

6. § 1 (4).

7. Id.

7a. In re Shachter, 9 Am. B. R. 499, 119 Fed. 1010. See § 2, subd. 16, ante.

8. *Atlantic Co. v. Dittmar Powder Mfg. Co.*, 9 Fed. 317; *Goodyear v. Mullee*, Fed. Cas. 5,577.

9. *Worden v. Searls*, 121 U. S. 14.

10. *Bridges v. Sheldon*, 7 Fed. 45.

§ 7a(3),(4),(5),(7).] Examination of Claims; Execution; Delivery of Papers.

It is under this subsection that referees frequently report contempts growing out of a bankrupt's refusal to obey an order requiring the surrender of money or property in his possession.<sup>11</sup>

*Punishment for Refusal.*— This may be by fine or imprisonment, or by fine and imprisonment.<sup>12</sup> Since the amendatory act of 1903, there is a further penalty, the refusal of a discharge.<sup>13</sup>

**Subs. a (3) (7). Examination of Claims and Notification of Trustee of Proof of False Claims.**— In actual practice, these subsections are rarely construed. The importance of a personal examination of all proofs of claims by the bankrupt is apparent, especially if he kept no books or his business records are unreliable. As a rule, the bankrupt sits by at the call of claims on the first meeting and informs the referee whether they are correct. He may, of course, be put on oath, if desired. He should also be frequently consulted by the trustee concerning the correctness of claims subsequently presented. At all times until his discharge, or until the final closing of administration if the discharge is granted sooner, it is also his duty to inform the trustee immediately in case he knows that a false claim has been proven. There seems to be no penalty, either by contempt or as for the commission of a crime, in case the bankrupt fails to perform these duties.<sup>14</sup> He also has sufficient standing to move to expunge a false claim, though where there is a trustee, the latter, as the representative of all the creditors, should do this.<sup>15</sup>

**Subs. a (4) (5). Execution and Delivery of Papers.**— Under the former law, a formal assignment was given the assignee (trustee) by the judge or register (referee).<sup>16</sup> This seems to have been for record purposes, a difficulty now met by the requirement permitting the recording of the order approving the trustee's bond in the proper record office,<sup>17</sup> and the new subsection requiring the recording of a copy of the adjudication.<sup>18</sup> No formal assignment is now necessary, the assets of the bankrupt at the time the petition was filed, by operation of law, passing, as of the date of the adjudication, to the

11. Compare text and cases referred to in §§ 2 (13) (15), 23-b, 41-a (1). reason; nor under § 29-b (3), which refers only to creditors.

12. § 2 (13) (15).

13. See § 14-b (6), as now.

14. Surely not under § 2 (13) (15), unless there is an order by the court; nor under § 41-a (1), for the same

15. In re Ankeny, 4 Am. B. R. 72, 100 Fed. 614.

16. Act of 1867, § 14; R. S., § 5044.

17. See § 21-e.

18. § 47-c, added by amendatory act of 1903.

trustee subsequently to be appointed.<sup>19</sup> When, however, the property is subject to the laws of another nation, a formal instrument, evidencing the transfer, often becomes necessary, and must then be executed by the bankrupt.<sup>20</sup> But, under the broad terms of these subsections, the court may order the bankrupt to execute any other papers; as, for instance, such consents as will permit the substitution of the trustee in a pending suit in a state court.<sup>21</sup> Under the present law, a bankrupt has been by the court compelled to execute the assignment of a license,<sup>22</sup> and to transfer his interest in an insurance policy.<sup>23</sup>

**Subs. a (6). Notification to Trustee of Attempt to Evade the Act.**—"To evade the provisions of the act" refers only to an attempted evasion within the bankrupt's knowledge. If the evasion be an accomplished fact, that there was an attempt to evade would probably follow. It would seem, too, that the attempt can be predicated on acts antedating the filing of the petition, as the acceptance of a preference voidable under § 60-b, or the completion of a fraudulent transfer, with knowledge on the part of the transferee, under § 67-e, and as well of those that are in the law deemed continuing as of those actually after the bankruptcy.<sup>24</sup> There is, however, no penalty for failure to perform this duty. This is unfortunate. Were punishment prescribed and enforcement against the bankrupt's person possible, frauds on creditors, due to evasions of the provisions of the Act, would rarely occur.

## II. Subs. a (8). PREPARATION AND FILING OF SCHEDULES.

**In General.**—The most important duty performed by a bankrupt's attorney consists in the preparation of his schedules. The form prescribed,<sup>25</sup> is carefully subdivided and elaborate in its invitation to details. The schedules often become of vital importance when application is made for a discharge, or when the discharge is pleaded in bar against a creditor at the time of the bankruptcy. The necessity

19. See § 70-a.

20. Compare *Oakey v. Bennett*, 11 98 Fed. 891.

How. 33.

21. *Samson v. Burton*, Fed. Cas. 100 Fed. 770.

12,285; In re *Clark*, Fed. Cas. 2,798.

22. In re *Fisher*, 3 Am. B. R. 406,

98 Fed. 891.

23. In re *Diack*, 3 Am. B. R. 723,

100 Fed. 770.

24. Compare § 29-b.

25. See Form No. 1.

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§ 7a (8).] When and by Whom Schedules Prepared and Filed.

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for careful investigation increases proportionately to the remoteness in point of time of the failure whence came the debts. No voluntary petition should be filed until the attorney in charge — by questioning and investigating the books of the debtor, and tracing the ownership of, not merely ordinary debts like accounts and notes, but also, from an examination of the records, of judgments and unliquidated liabilities like bonds or notes accompanying mortgages — is reasonably certain that he knows every financial obligation of his client, its actual then owner, and what is the post-office address of that owner. The property interests of the debtor, whether present, in future, or contingent, should also be carefully ascertained, as should the exemptions allowed by the state law. Not until all these facts are in hand and summarized should the lawyer begin drawing the papers.<sup>26</sup>

*When to be Prepared and Filed.*— It is the bankrupt's duty to file the schedules with a voluntary petition, or, if the proceeding be involuntary, within ten days after the adjudication, unless further time is granted. For the place where such petition must be filed, and by and against whom it can be filed, reference should be had to the appropriate sections.<sup>27</sup> Whether a voluntary petition can be filed while there is an involuntary petition pending against the petitioner, is a mooted question, as it was under the previous law.<sup>28</sup>

*By Whom to be Prepared and Filed.*— The schedules may be prepared and filed either by the bankrupt, by the creditors, or by the referee. Thus, if the bankrupt, in an involuntary case, fails to prepare and file schedules within ten days, or where the bankrupt otherwise fails, refuses, or neglects so to do, the referee must do or cause it to be done;<sup>29</sup> to this end the bankrupt may be ordered to appear and testify. This provision, however, seems to be modified by General Order IX. By its terms, in involuntary cases, the initiative is put on the petitioning creditors. If the bankrupt can be served with notice, his failure to file schedules entitles them to an attachment

26. The importance of these suggestions cannot be too strongly emphasized. Starting right will save many delays and much annoyances later, and, to the bankrupt, may amount to a discharge that can be relied on as a stout bar to all possible suits, or a mere reed that will bend and break when most needed.

27. See Sections Two, Three, Four, Five, Eighteen, Fifty-nine, and Sixty-three of this work.

28. Compare *In re Flanagan*, Fed. Cas. 4,850, with *In re Stewart*, Fed. Cas. 13,419. See also under Section Eighteen of this work.

29. § 39-a (6).

against his person; if he cannot be found, they must file a schedule, giving the names and places of residence of all the creditors, according to their best information. They, as a rule, know little or nothing about the other creditors. Hence where the bankrupt has disappeared, in some districts a practice has grown up of bringing into courts on subpoenas all persons who would be likely to know the facts, and, in a preliminary proceeding, on the evidence of such persons, making up the list required. Such a procedure is certainly within the broad powers conferred on courts of bankruptcy, and may be instituted both by the petitioning or other creditors, or by the referee himself. Such schedules, when prepared, should, of course, be in triplicate, and conform as nearly as possible to those which make a part of Form No. 1, though they need give only names and addresses.

**Frame of Schedules.**—As under the law of 1867, the forms accompanying the General Orders include a form for schedules. It has been held that failure to use this form warrants the court in dismissing the petition.<sup>30</sup> The form prescribed covers property in reversion, remainder or expectancy, includes property held in trust for the debtor, or subject to any power or right to dispose of, or to charge, including a particular statement of property which had been conveyed for the benefit of creditors.<sup>30a</sup> Manifestly the rule requiring its use is in the interest of uniformity and for the convenience of the courts and parties only. Schedules conforming substantially to the requirements of the statute and not necessarily to the rules and forms also would be sufficient.<sup>31</sup> The earlier blank forms could not be used in typewriting machines. As they must be filed in triplicate, the use of those blanks that are so printed as to permit their being typewritten and, therefore, manifolded, is advised. It should be noted also that the statute requires that the schedules only be in triplicate. A voluntary petition may be a separate paper, though this is unusual.

**Contents.**—The schedules divide themselves naturally into three parts, (a) of creditors, (b) of assets, and (c) of exemptions; this was the form suggested by the first edition of this work. The official form, however, includes the exemption in the property schedule.

<sup>30</sup>. *Mahoney v. Ward*, 3 Am. B. R. 770, 100 Fed. 278.

<sup>30a</sup>. *In re Gailey*, 11 Am. B. R. 539, 127 Fed. 538.

<sup>31</sup>. *In re Soper*, 1 Am. B. R. 193. See also under Section Eighteen.

Cases of the necessity of claiming exemptions will be found in the foot-note and elsewhere.<sup>32</sup>

*Schedule of Creditors and Liabilities.*—By far the most important schedule is that of creditors.<sup>33</sup> Its purpose is threefold, (a) to give the court information as to the persons entitled to notice, (b) to inform the trustee as to the claims against the estate and the considerations on which they rest, and (c) to an extent at least, to limit the effect of the bankrupt's discharge to parties to the proceeding. It follows that the requirements of the statute: "a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due to each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to," should be strictly observed. It has been held that ditto marks should not be used.<sup>34</sup> The practice of writing in the word "none" where the facts come within the terms of the forms is now quite universal and should be followed. The names of creditors should be written in with care,<sup>35</sup> and when the creditor is a copartnership whose claim has been reduced to judgment in favor of the individuals, the names both of the firm and of the individuals should be set out. Even greater care should be observed in the matter of addresses. It is still questionable whether a notice addressed to a creditor resident in a large city, without giving the street number or post-office box, complies with the statute.<sup>36</sup> Abbreviated addresses, such as "135 Bway," are not allowed under General Order V.<sup>36a</sup> All creditors should be scheduled, even those barred by the statute of limitations; but scheduling the latter is not a revival of the debt.<sup>37</sup> Accuracy is not so important in stating the amount of the debt, its consideration or when and where contracted; but these facts should be fully set out when possible. The description of securities should be sufficient to inform the court of their value, should a motion be made at the first meeting to adjust the same for voting purposes.<sup>38</sup> Where claims have been reduced to judgment, the creditor

32. See under Section Six, ante. See also *In re Nunn*, 2 Am. B. R. 664; *In re Harrington*, 1 N. B. N. 513; *In re Harber*, 2 N. B. N. Rep. 449; *McGahan v. Anderson*, 7 Am. B. R. 641, 113 Fed. 115.

33. Schedule A (1) (2) (3) (4) of Form No. 1.

34. *In re Mackey*, 1 Am. B. R. 593.

35. See *Liesum v. Kraus*, 71 N. Y.

Supp. 1022. See also *In re Archibrown*, Fed. Cas. 504.

36. Compare, for effect of omission of creditor, under Sections Fourteen and Seventeen of this work.

36a. *Sutherland v. Lasher*, 11 Am. B. R. 780, 41 Misc. (N. Y.) 249.

37. *In re Lipman*, 2 Am. B. R. 46, 94 Fed. 353; *In re Resler*, 2 Am. B. R. 602, 95 Fed. 304.

38. See § 57-c.

## Schedule of Assets and Exemptions; Verification. [§ 7a (8).]

to be scheduled is the record holder, whoever may be the actual holder.<sup>39</sup> Cases valuable by way of suggestion will be found in the foot-note.<sup>40</sup> The effect on the discharge of the omission of creditors from the schedule is discussed under Section Seventeen, *post*.

*Schedule of Assets and Exemptions.*—The words of the statute require this schedule to show “the amount and kind of property, the location thereof,” and “its money value in detail.” What has been said in the previous paragraph as to accuracy and details applies with equal force here. The oath to this schedule calls for an affidavit that it is a statement of “all his estate, both real and personal,” words which mean what they say.<sup>41</sup> While, where the omission of assets is charged, it is not usually difficult to show either mistake in law or want of intent, the only safe way is to schedule all interests in property,<sup>42</sup> including, of course, property claimed to be exempt, whether such property seems to pass to the trustee or not.<sup>43</sup> Property transferred by the bankrupt by general assignment or otherwise, if his act will be voidable by his trustee, as well as all property fraudulently conveyed, should be included.<sup>44</sup> The grantee of lands subject to a trust for the benefit of the grantor takes an interest in the lands and must schedule the same upon becoming a bankrupt.<sup>44a</sup> For interesting authorities as to what is and what is not property, see the foot-note for cases under the present law and the digests of the period for those under its predecessors.<sup>45</sup>

*Verification.*—The previous statute required the schedules to be verified before a federal officer. Now, they can be verified before state officers.<sup>43</sup> The oaths, like each separate sheet of the schedules, should be signed by the bankrupt. As the official forms are now printed, space is not provided for the signature. It is not thought, however, that a separate verification is so essential as to affect jurisdiction provided the schedules accompany the petition; the oath to

39. *Sellers v. Bell*, 2 Am. B. R. 529, 94 Fed. 811.

40. *In re Brumelkamp*, 2 Am. B. R. 318, 95 Fed. 814; *In re Royal*, 7 Am. B. R. 106.

41. See Sections Fourteen and Twenty-nine, *post*.

42. *In re Beal*, Fed. Cas. 1,156.

43. See Section Seventy as to certain insurance policies.

44. *In re Pierce*, Fed. Cas. 11,141; *In re O'Bannon*, Fed. Cas. 10,394.

*Contra*, *In re Robertson*, Fed. Cas. 11,021.

44a. *In re Gailey*, 11 Am. B. R. 539, 127 Fed. 538.

45. *In re Bean*, 4 Am. B. R. 53, 100 Fed. 262; *In re Barrow*, 3 Am. B. R. 414, 98 Fed. 582; *In re Harris*, 2 Am. B. R. 359; *In re Walther*, 2 Am. B. R. 702, 95 Fed. 941; *In re Wood*, 3 Am. B. R. 572, 95 Fed. 946.

46. See § 20-a.



the latter, when coupled with its reference to the schedules and what they contain, are enough to comply with the statute.<sup>46a</sup>

**Amendment of Schedules.**—It is the referee's duty to cause incomplete or defective schedules to be amended.<sup>47</sup> This he can do on his own motion, or in response to an application under General Order XI. Amendments to the schedule of creditors often become necessary. If the first meeting has been held, an amendment may deprive a creditor brought in of his right to participate in the choice of trustee, and, therefore, the reason for the omission should appear to be sufficient.<sup>48</sup> Under the former law, it was frequently held that amendments might be made, even after objections had been filed to a discharge.<sup>49</sup> This is undoubtedly so under the present law, but the utmost good faith should appear.<sup>50</sup> Both petition and order should be in triplicate, and the copies intended for the clerk and the trustee should be immediately sent them by the referee. A suggested practice on amendments of this character is set out in the foot-note.<sup>51</sup> Forms for amending schedules will be found under "Supplementary Forms," *post*.

46a. Matter of McConnell, 11 Am. B. R. 418.

47. § 39 (2); In re Ankeny, 4 Am. B. R. 72, 100 Fed. 614; In re Orne, Fed. Cas. 10,582; In re Brumelkamp, *supra*.

48. In re Myers, 3 Am. B. R. 760; In re Bean, 4 Am. B. R. 53, 100 Fed. 262; In re Wilder, 3 Am. B. R. 761, 101 Fed. 104.

49. In re Heller, Fed. Cas. 6,339; In re Connell, Fed. Cas. 3,110; In re Preston, Fed. Cas. 11,392.

50. In re Eaton, 6 Am. B. R. 531, 110 Fed. 731; In re Royal, 7 Am. B. R. 106; In re Mudd, 2 N. B. N. Rep. 710. Application has been defeated after a year has elapsed and where objections to the discharge have been filed. In re Hawk, 8 Am. B. R. 71, 114 Fed. 916. Consult also, for amendments of claims to exemptions, Section Six; and, for amendments to petition, Section Eighteen, and for amendments to proofs of debt, Section Fifty-seven. See also "Supplementary Forms," *post*.

51. 1. Prior to the time set for, or before the transaction of any other business at, the first meeting of cred-

itors, a petition and schedules or other papers may be amended and new parties may be brought in, as of course and without notice, unless otherwise ordered. Except as hereinbefore in this rule provided, at or after the first meeting of creditors, a petition and schedules or other papers shall not be amended in any material matter, except on an application, made either at a stated meeting or hearing, or upon motion and cause shown, after due notice to the adverse party or the creditor or other party in interest to be affected thereby. In case the amendment will add a party to the proceeding, such party shall be entitled to notice of the motion, and any meeting already noticed may be adjourned for that purpose. If publication is begun or is completed when the motion for the amendment adding other parties is made, further publication as to such parties may be dispensed with.

2. All applications for amendments shall be made by a verified petition addressed to the referee, and the amendments desired shall be set out in separate schedules or paragraphs

## III. Subs. a (9). PUBLIC EXAMINATION OF BANKRUPT.

**In General.**—The right to examine the bankrupt is essential to a due administration of the law. It has existed since the very earliest of the English bankruptcy laws. The present English law provides for a public examination even before the first meeting of creditors.<sup>52</sup> Under our law, the examination may be had “at the first meeting of creditors or at such other times as the court shall order.” This has been held to permit an examination for the purpose of making up the schedules,<sup>53</sup> or merely to lay a foundation for objections to a discharge,<sup>54</sup> or after the discharge.<sup>55</sup> The intent of this subsection seems to be that creditors may have an examination of the bankrupt at any time during the pendency of his proceedings.<sup>56</sup> If present at a regular meeting of creditors, the bankrupt may be sworn, if with his consent, and, while there is authority the other way,<sup>57</sup> without his consent if so ordered by the court — this under the general powers conferred by § 2 (15) and the broad phrasing of the subsection under discussion.

*How Brought On.*—At the first meeting of creditors, the referee should ask if an examination of the bankrupt is desired, and, if so, should, if the bankrupt is present, order it to proceed. If the bankrupt is absent, a direction through his attorney will usually secure his presence. If he is obdurate, the referee may, on his own motion or at the instance of any creditor whose claim is proven, or the trustee, make an order requiring his attendance for examination,<sup>58</sup> and failure or refusal to do so will be reported as a contempt. The proviso clause of this subsection and the restrictions as to time, previously noted, are the only limitations, other than a sound discretion, on the granting of this order. The examination, when once begun, should, however, not be unnecessarily prolonged. Nor, after the

and in such a way as to bring them clearly to the attention of the referee. Similar schedules or paragraphs shall also be incorporated in any order granting amendments. Copies of orders which amend a petition and schedules, duly certified by the referee, shall be forthwith filed with the clerk and, if then appointed, with the trustee. (Rule 5, Erie County District, Western District of New York.)

<sup>52.</sup> Act of 1883, § 16. This resembles our requirement for an

examination in open court before a composition may be offered; § 12-a.

<sup>53.</sup> In re Franklin Syndicate, 4 Am. B. R. 244, 101 Fed. 402.

<sup>54.</sup> In re Price, 1 Am. B. R. 419, 91 Fed. 605.

<sup>55.</sup> In re Peters, 1 Am. B. R. 248; In re Westfall, etc., Co., 8 Am. B. R. 431.

<sup>56.</sup> In re Mellen, 3 Am. B. R. 226, 97 Fed. 326.

<sup>57.</sup> In re Price, supra, and § 58-a (1).

<sup>58.</sup> See Form No. 28.

## § 7a (9).]

## Method of Conducting.

completion of the main examination and the bankrupt has been excused, should he be recalled, save for good cause shown.

*Method of Conducting.*—The usual method of question and answer is followed, but the rules of evidence are not the same as on ordinary trials. The examination is in the nature of an inquisition, and great latitude is allowed the examiner. It may be taken down in narrative form, or in the form of question and answer,<sup>59</sup> and the referee may, upon the application of the trustee, authorize the employment of a stenographer for that purpose and order him paid out of the estate.<sup>60</sup> The fiction that, in every such case, the trustee has been directed to employ a stenographer, seems quite universal throughout the country. It is even the practice to employ such an assistant where there is no estate and to order the bankrupt to deposit with the referee a sum sufficient for that purpose. This practice, which claims to be sanctioned by General Order X, and is usually prescribed in local rules, is clearly within the broad powers conferred on courts of bankruptcy by § 2 (15), and has now been ratified by usage.<sup>61</sup> The examination, when reduced to writing, must be read over by the bankrupt and subscribed by him.<sup>62</sup> The bankrupt may usually have counsel, but it is clearly improper that the bankrupt's counsel conduct his examination on behalf of the trustee.<sup>63</sup> The referee has ample power to administer oaths and compel the produc-

59. General Order XXII, § 39-a (9).

60. See § 38-a (5).

61. Thus:

1. The examination of the bankrupt and other witnesses at meetings of creditors or otherwise, and all testimony offered on contested claims, or for any other purpose, will be taken down by the official stenographer in the form of question and answer, and transcribed. One copy thereof will be inserted in the record book of the referee and the other copy will be delivered to the trustee. The expense of thus perpetuating testimony will be at the rate of ten cents (10c.) a folio for both copies, and shall be paid as follows: Where there are no assets, for one reasonable examination on one day, by the bankrupt, and thereafter by the creditor or party in interest for whose benefit or at whose request such examination is had; where there are assets, as may

be ordered by the referee in each particular case.

2. After the testimony has been transcribed the attorney in charge of the case will produce each witness before the referee, that such testimony may be signed as provided in General Order XXII.

3. If indemnity is not demanded, all moneys advanced by the referee in publishing or mailing notices, or for traveling expenses, or for procuring the attendance of witnesses, or for perpetuating testimony, or otherwise, shall be paid to the referee prior to, or at the time, application is made to him for the report or certificate called for by District Rule X. (Rule 11, Erie County District, Western District of New York.)

62. General Order XXII.

63. In re Teuthorn, 5 Am. B. R. 767.

tion of documents.<sup>64</sup> He should have entered on the record any objections to testimony and his rulings thereon, and any offers to prove which he rules out, as well as any statements of counsel or the bankrupt when asserting the latter's constitutional privilege.<sup>65</sup>

**Subject-Matter of the Examination.**— This is pointed out by the words of the statute, *i. e.*, “concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate.” Broader phrases could not well have been employed.<sup>66</sup> But the examination cannot as a rule be extended to property acquired after the petition was filed.<sup>67</sup> On the other hand, it is not limited to transactions during the four months' period.<sup>68</sup> The difference between an examination under this subsection and one under § 21-a should always be borne in mind. It should also be noted that, unlike the register under the former Act, the referee has full power to pass on the relevancy or materiality of evidence.<sup>69</sup> Suggestive precedents under both statutes will be found in the foot-note.<sup>70</sup>

64. § 38-a (2).

65. The practice is clearly indicated in the following:

“Referees may pass upon the competency, materiality and relevancy of evidence in matters properly before them for investigation, and shall have all the powers of the judge concerning the admission or rejection thereof, and shall note on the record all objections, the rulings thereon and the exceptions which may be taken; and in cases where testimony is excluded they shall note a brief statement by the party offering the same of the facts he expects to prove thereby. Referees shall limit the inquiry before them to relevant and material matters, and in case an examination or a cross-examination is unnecessarily prolix, or improperly prolonged, the referee may, in his discretion, limit the time of such examination; or he may impose costs, including the fees of the stenographer and other expenses, upon the party responsible for the improper

prolongation.” (Rule XXII, Western District of New York.) See *Dressell v. North State Lumber Co.*, 9 Am. B. R. 541, 119 Fed. 531.

66. In re Horgan, 3 Am. B. R. 253, 98 Fed. 414, affirming *s. c.*, 92 Fed. 319; In re Fixen, 2 Am. B. R. 822, 96 Fed. 748; In re Foerst, 1 Am. B. R. 259, 93 Fed. 190.

67. In re Hayden, 1 Am. B. R. 670, 96 Fed. 199; In re White, 2 N. B. N. Rep. 536. But see In re Walton, 1 N. B. N. 533; In re Clark, Fed. Cas. 2,805, and In re McBrien, Fed. Cas. 8,666.

68. In re Brundage, 4 Am. B. R. 47, 100 Fed. 613.

69. § 38-a (2).

70. In re Lange, 3 Am. B. R. 231, 97 Fed. 197; In re Tudor, 4 Am. B. R. 78, 100 Fed. 796; In re Kamsler, 97 Fed. 194; In re Bonesteel, Fed. Cas. 1,628; In re Holt, Fed. Cas. 6,646; In re Cooke, Fed. Cas. 3,168; In re Salkey, Fed. Cas. 12,252; In re Campbell, Fed. Cas. 2,348; In re Hatje, Fed. Cas. 6,215.

## § 7a (9).] Unsatisfactory Answers; Criminating Questions.

**Unsatisfactory Answers.**—It has been suggested that when, in reply to questions necessarily within the knowledge of the bankrupt, the bankrupt replies: "I don't remember," or in like fashion, it amounts to a contempt. The English cases tend that way.<sup>71</sup> Few American cases go to this extent. Yet, under the former law, where the bankrupts had concealed a large sum, and, when questioned, "had told all they knew on the subject," and refused to answer further questions because "they knew no more about the matter," they were punished for contempt.<sup>72</sup> The cases under the present law turn usually, not on the answers being unsatisfactory, but rather on the conclusions therefrom and from the other evidence that the bankrupt is withholding property from his trustee.<sup>73</sup> It may be doubted whether *In re Salkey* amounts to what is claimed for it. Unsatisfactory answers are, therefore, it would seem, while often contemptuous, not a contempt in law, and cannot be punished as such.

**Criminating Questions.**—The once-mooted question as to whether the words "but no testimony given by him shall be offered in evidence against him in any criminal proceeding" amount to the privilege against testifying against himself guaranteed by the Fifth Amendment to the Constitution seems no longer open. An array of judges and referees have held that it does not;<sup>74</sup> and the authorities the other way seem not to have recognized the full force of *Counselman v. Hitchcock*.<sup>75</sup> The Supreme Court has not yet passed upon this important question, but the case just mentioned seems to preclude any other view.<sup>76</sup> The bankrupt may even assert his privilege in a plea in response to a petition that he be ordered to surrender property.<sup>77</sup> It may be that the privilege will not in the end be extended to transactions like those under examination in the *Sapin* and *Walsh* cases.<sup>78</sup> At present, however, the reliability even

71. Ex parte Legge, 17 Jurist, 415; In re Martin, 11 Jurist, 461; Ex parte Lord, 10 Mees. & W. 463.

72. In re Salkey, Fed. Cas. 12,253.

73. In re McCormick, 3 Am. B. R. 340, 97 Fed. 566; In re Schlesinger, 3 Am. B. R. 342, 97 Fed. 935; In re Deuell, 4 Am. B. R. 60, 100 Fed. 633.

74. In re Scott, 1 Am. B. R. 40, 95 Fed. 815; In re Hathorn, 2 Am. B. R. 298; In re Rosser, 2 Am. B. R. 755, 96 Fed. 305; In re Feldstein, 4 Am. B. R. 321, 108 Fed. 794; In re Henschel,

7 Am. B. R. 207; In re Shera, 7 Am. B. R. 552, 114 Fed. 207; In re Nachman, 8 Am. B. R. 180, 114 Fed. 995.

75. 142 U. S. 547. See also Brown v. Walker, 161 U. S. 591.

76. Among the cases contra are: Mackel v. Rochester, 4 Am. B. R. 1, 102 Fed. 314; In re Franklin Syndicate Co., 4 Am. B. R. 511.

77. In re Glasser, 8 Am. B. R. 184.

78. In re Sapin, 92 Fed. 342; In re Walsh, 4 Am. B. R. 693.

of the rules there asserted must be considered still debatable. That the protection extends only to prosecutions in the federal courts,<sup>79</sup> and that the bankrupt's books taken possession of by his receiver in bankruptcy cannot be used against him,<sup>80</sup> are holdings equally in doubt. If the court is convinced that an answer to a question cannot by any possibility criminate the bankrupt, and especially if he does not swear that he believes it would, it is the duty of the court to compel him to answer.<sup>80a</sup> The provision does not exempt the bankrupt from prosecution for an unlawful act concerning which he voluntarily testifies, but only provides that his testimony so given cannot be used against him on such prosecution.<sup>80b</sup>

*Effect of § 14-b (6).*—The amendatory act of 1903 makes the bankrupt's refusal "to obey any lawful order or to answer any material question approved by the court" an objection to a discharge. The new clause is clearly aimed at the difficulty mentioned in the preceding paragraph. Its constitutionality was questioned even in advance of its becoming the law.<sup>81</sup> But a discharge in bankruptcy is not a natural right. It is rather in derogation of the great natural right of property. Some have called it more aptly a boon. The bankrupt comes into court asking this boon. His privilege from testifying is also a boon given him by the organic law. He has the option to choose between them. There are as yet no cases construing this new subsection or passing on its constitutionality.

*Effect of False Swearing.*—This subject and the right to use the bankrupt's examination as a means to prevent his discharge is discussed in detail later.<sup>82</sup>

*Examination of Third Persons.*—§ 7-a (9), previously discussed, has to do only with the examination of the bankrupt. The procedure on and the subject-matter and effect of the examination of other witnesses, and the bankrupt, too, for that matter, under § 21-a, will be found in another place.<sup>83</sup>

79. In re Nachman, supra.

80. People v. Swarts, etc., 8 Am. B. R. 487.

80a. Matter of Levin, 11 Am. B. R. 832.

80b. Burrell v. State, 12 Am. B. R. 132, 194 U. S. 572, affirming 27 Mont. 282, 70 Pac. 982.

81. See editor's note to In re Feldstein, 4 Am. B. R. 321. But see contra, In re Nachman, ante.

82. Sections Fourteen and Twenty-nine of this work.

83. See Section Twenty-one, post.

## SECTION EIGHT.

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### DEATH OR INSANITY OF BANKRUPTS.

§ 8. **Death or Insanity of Bankrupts.**— *a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided*, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

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**Analogous provisions:** In U. S.: Act of 1867, § 12, R. S., § 5090; Act of 1800, § 45.

In Eng.: Act of 1883, § 108.

**Cross references:** To the law: §§ 4; 5-a.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Comparative Legislation.

The English and the American Rules.

#### II. Effect of Bankrupt's Death or Insanity on the Proceeding.

In General.

On Right to Discharge.

#### III. Effect on Statutory Rights of Widow and Children.

Dower and Statutory Allowances.

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#### I. COMPARATIVE LEGISLATION.

**The English and the American Rules.**— There is at present no substantial difference between the statutes, save that the English

section provides for the contingency of death only.<sup>1</sup> But there the court may, in its discretion, refuse to proceed.<sup>2</sup> The English practice also permits the service of process on the personal representatives of the debtor, if he dies before such service.<sup>3</sup> Our law, in providing that there shall be no abatement after a petition filed, seems to warrant this practice. The analogous section in our statute of 1800 provided only for the due distribution of assets in case of death "after any commission in bankruptcy sued forth;" that of 1867 was permissive, not mandatory, and was applicable only "after the issue of the warrant" (in this being identical with that of 1800), but had no provision relative to insanity or concerning dower or allowances.

## II. EFFECT OF BANKRUPT'S DEATH OR INSANITY ON THE PROCEEDING.

**In General.**—The language of this section is mandatory. The proceeding "shall not abate" and "shall be conducted and concluded in the same manner, so far as possible" as though the debtor had not died or become insane. It was held under the former law that involuntary proceedings abated on the death of the alleged bankrupt before the trial, but not if the adjudication had been made, even though the warrant had not been issued;<sup>4</sup> but the rule was different where one of two or more partners died after the filing of a petition against the copartnership.<sup>5</sup> Only the case last cited is now applicable. The filing of a petition begins "the proceedings," and there can be no abatement after that.<sup>6</sup> The rule is the same whether the cause be death or insanity, but, if the latter, a committee *ad litem* should be appointed.<sup>7</sup> It has also been held that this section applies to a corporation seeking to defeat bankruptcy proceedings by a voluntary dissolution begun after petition filed.<sup>8</sup>

**On Right to Discharge.**—The decisions under the previous law to the effect that a discharge could not be granted where the bankrupt

1. Act of 1883, § 108.

2. Compare *In re Obbard*, 24 L. T. N. S. 145, under the Act of 1869, with *In re Walker*, 54 L. T. N. S. 682, under that of 1883.

3. *Ex parte Hill*, 4 Morrell, 281.

4. *Frazier v. McDonald*, Fed. Cas. 5,073; *In re Litchfield*, Fed. Cas. 8,385.

5. *Hunt v. Pooke*, Fed. Cas. 6,896. Compare *Ex parte Hall*, 1 De Gex, 332.

6. *In re Hicks*, 6 Am. B. R. 182, 107 Fed. 910.

7. Compare *In re O'Brian*, 2 N. B. N. Rep. 312.

8. *Scheuer v. Smith, etc., Co.*, 7 Am. B. R. 384, 112 Fed. 407.



§ 8.]

Dower and Statutory Allowances.

had died after the adjudication, are no longer applicable,<sup>9</sup> for the simple reason that such cases rested on the requirement of that law that the bankrupt should, when applying for his discharge, take a certain oath. No such oath is now necessary, and a discharge will be granted, even though the requirement calling for the personal presence of the bankrupt cannot be complied with.<sup>10</sup>

### III. EFFECT ON STATUTORY RIGHTS OF WIDOW AND CHILDREN.

**Dower and Statutory Allowances.**—The proviso clause is a new enactment. It does not, however, change existing law.<sup>11</sup> The doctrine rests on the principle that the trustee's title is charged with the same liens and burdens, whether actual or inchoate, as was the bankrupt's. It is not material that the husband died after the vesting of the title in the trustee.<sup>12</sup> What would be the effect of this clause provided the rights or allowances were not actually inchoate at the time the proceedings began, has not yet been decided; the words used would, however, seem sufficient to cover such a case.<sup>13</sup> The rule as to dower applies to allowances to widow or children by the state statutes. The beneficiaries take them, as if there had been no bankruptcy. Where such allowances are authorized by state statutes the bankruptcy court may make them.<sup>13a</sup>

9. In re O'Farrell, Fed. Cas. 10,446; In re Gunike, Fed. Cas. 5,868.

10. In re Parker, 1 Am. B. R. 615. See also under Section Fourteen of this work.

11. Porter v. Lazear, 109 U. S. 84.

12. In re Slack, 7 Am. B. R. 121, 111 Fed. 523.

13. But compare Hawk v. Hawk, 4 Am. B. R. 463, 102 Fed. 679.

13a. In re Newton, 10 Am. B. R. 345, 122 Fed. 103; In re Parshen, 9 Am. B. R. 389, 119 Fed. 976. Contra, In re Seaboldt, 8 Am. B. R. 61.

## SECTION NINE.

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### PROTECTION AND DETENTION OF BANKRUPTS.

§ 9. **Protection and Detention of Bankrupts.**—*a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

*b* The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

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**Analogous provisions:** In U. S.: *As to* (a), Act of 1867, § 26, R. S., § 5107; Act of 1800, §§ 22, 38, 60; *As to* (b), Act of 1867, § 40, R. S., § 5024.

In Eng.: *As to* (a), Act of 1883, § 9 (1).

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§ 9.]                      Synopsis of Section; Comparative Legislation.

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**Cross references: To the law:** §§ 1 (4); 2 (13) (15); 10; 11-a; 17; 63.

Compare also R. S., §§ 752, 753.

**To the General Orders:** XII, XXX.

**To the Forms:** None.

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## SYNOPSIS OF SECTION.

### I. Comparative Legislation.

Analogous Provisions.

Scope of Section.

### II. Subs. a. Protection of Bankrupts.

When the Right to Protection Begins and Ends.

On What it Depends.

*The Kind of Liability.*

Practice.

*General Order XXX.*

### III. Subs. b. Detention of Bankrupts.

Purpose of Section.

Practice.

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## I. COMPARATIVE LEGISLATION.

**Analogous Provisions.**—The corresponding clause in the English Act of 1883 applies both to protection from arrest and to the stay of suits; a bankrupt from the moment of the receiving order is immune from arrest on civil process.<sup>1</sup> Our first statute exempted the bankrupt from arrest for forty-two days—this, to give ample time for his examination—no matter what the character of the indebtedness, and from an arrest based on a debt owing before the bankruptcy during the pendency of the proceeding. The law of 1867 differs little from the present law, save in omitting entirely the two excepted classes stated in subheads (1) and (2). Minor differences will be discussed later.

**Scope of Section.**—This section has undoubtedly a threefold purpose: (a) to preserve unimpaired the authority of the court of bankruptcy over the persons of the parties to the proceeding, (b) to protect the debtor from imprisonment on all civil suits in which the remedy will be barred by the subsequent discharge, and (c), as inci-

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1. Act of 1883, § 9 (1) (2).

## When Right to Protection Begins and Ends.

[§ 9a.]

dental to the first purpose and analogous to that expressed in § 10, to detain a bankrupt in the district when there seems a likelihood of his departing from it. There are two kinds of protection from arrest, (a) the absolute right, which existed at common law, *i. e.*, while in attendance on court or engaged in performing a duty imposed by the bankruptcy act, and (b) the qualified right, which may not exist as against a liability to which a discharge is not a release, or a warrant or order of commitment based upon a bankrupt's contempt or disobedience of the lawful orders of a court of bankruptcy. The section itself is somewhat narrower than its supplement, General Order XXX;<sup>2</sup> this same discrepancy existed under the former laws.<sup>3</sup> So far as possible, however, the two should be construed together. But § 9-b should not be confounded with § 11-a; nor should the right to detain the person be confused with the right to seize that person's property;<sup>4</sup> and jurisdiction to protect from arrest, which is similar to the jurisdiction to restrain proceedings which may result in arrest, should always be clearly distinguished from it.<sup>5</sup> It should be noted also that the General Order XXX refers only to cases where the bankrupt has been actually imprisoned, while General Order XII has to do with protection from an arrest not yet accomplished.

## II. Subs. a. PROTECTION OF BANKRUPTS.

**When the Right to Protection Begins and Ends.**—This right is personal to the bankrupt. By § 1 (4), a person who files a petition or one against whom a petition is filed is from that moment a bankrupt. The right is not available after he ceases to be a bankrupt, *i. e.*, when he is discharged.<sup>6</sup> This period is not, as a rule, later than eighteen months after the adjudication; but may be, as where a contest develops on the application for the discharge. It is conceivable, also, that a petitioner may delay the adjudication so as to prolong the time. But the courts can impose terms on granting orders of protection, and such an effort would be quickly checked.

<sup>2</sup>. In re Baker, 3 Am. B. R. 101, 96 Fed. 954.

<sup>3</sup>. See § 26, law of 1867, with General Order XXVII under that law.

<sup>4</sup>. Consult also under Sections Two, Three, and Sixty-nine.

<sup>5</sup>. See under Section Eleven, and compare In re Walker, Fed. Cas. 17,060; In re Hazelton, Fed. Cas. 6,287.

<sup>6</sup>. In re Wiggers, Fed. Cas. 17,623.

**On What it Depends.**—Protection is, as a rule, granted only to bankrupts. It has been held, however, that, under the common law, the right of protection extends to witnesses,<sup>7</sup> and to parties, including creditors, while attending bankruptcy proceedings.<sup>8</sup> The protection given to such persons is, however, only that always allowed to those in attendance on a court, or in going and coming to the court, in response to its summons or mandate. There seem to be some limitations to this right, even when asserted by the bankrupt himself. Thus, it has been held that this section does not warrant a release from custody under an arrest made before the filing of the petition,<sup>9</sup> or where the claim, though provable, is not also dischargeable.<sup>10</sup> This latter doctrine has, however, been questioned, for the reason, among others, that the words "to continue until the final adjudication upon his application for discharge," in General Order XII, may be considered an interpretation of the exception found in the last clause of § 9-a (2).<sup>11</sup> Still, while the bankrupt is entitled to a liberal construction, it is hardly supposable that the intention of Congress was to exempt him from arrest on civil process during the entire period of his bankruptcy, merely because he is bound to testify or perform certain duties during that period.<sup>12</sup> The phrasing of General Order XXX seems also to limit the right to protection from an arrest already made to voluntary bankrupts. Under the policy of the law, as indicated by § 1 (1), this right, however, is equally available to involuntary bankrupts.<sup>13</sup>

*The Kind of Liability.*—The debt on which custody rests must be dischargeable in bankruptcy. This is imported negatively from the affirmative exception stated in § 9-a (2). Some of the cases where protection has been granted or refused under the present law will be found in the foot-note.<sup>14</sup> The dischargeability of debts

7. *Lamkin v. Starkey*, 7 Hun (N. Y.), 479.

8. *Ex parte List*, 2 Ves. & B. 373; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Matthew v. Tufts*, 87 N. Y. 568.

9. *In re Claiborne*, 5 Am. B. R. 812, 109 Fed. 74.

10. *In re Baker*, 3 Am. B. R. 101, 96 Fed. 954.

11. Compare *In re Kimball*, Fed. Cas. 7768, with *In re Lewensohn*, 3 Am. B. R. 594, 98 Fed. 576. See also *Matter of Dresser*, 10 Am. B. R. 270, 124 Fed. 915.

12. For what is doubtless the policy of the law, see the forty-two-day exemption provided by § 22 of the Act of 1800.

13. See under the law of 1857, *In re Wiggers*, supra; *In re Williams*, Fed. Cas. 17,700.

14. *In re Lewensohn*, supra; *In re Marcus*, 5 Am. B. R. 365, 105 Fed. 907; *In re Smith*, 3 Am. B. R. 67; *In re Houston*, 2 Am. B. R. 107, 94 Fed. 119; *In re Nowell*, 3 Am. B. R. 837, 99 Fed. 931; *Wagner v. U. S. & Houston*, 4 Am. B. R. 596, 104 Fed.

is discussed in detail under Section Seventeen, *post*. How far the determination of the court of bankruptcy on the fact that the debt is dischargeable, or not, should be followed by the state courts later, is for such courts to decide. It may thus happen that, during the bankruptcy proceedings, a debtor will be protected, only to find the discharge of no avail when pleaded in *habeas corpus* in a state court on a subsequent arrest.<sup>15</sup> Where the application is for protection against arrest while in attendance or while performing some duty prescribed by the act, the dischargeability of the debt is, of course, not material.

**Practice.**—If the application is before arrest, it often takes the form of a petition for a stay, on the theory that the order of arrest is a step in a suit; and, if so, it will be in accordance with the practice indicated under Section Eleven. Where, however, the bankrupt desires protection against arrest generally, the proper method is to apply for an order of protection, which can be granted by the referee.<sup>16</sup> This order is a matter of right, but extends only to process resting on debts which are dischargeable, and should be in terms so limited. If the bankrupt has already been arrested and he applies for release on the ground that the debt is dischargeable, comity suggests an application in the first instance to the state court,<sup>17</sup> though such an application can be made to a federal court having jurisdiction, if that course is preferred.<sup>18</sup> It is doubtful whether an application of the latter kind should be made to the referee.<sup>19</sup>

**General Order XXX.**—The practice is well outlined in General Order XXX. Where the reason for the application is that the bankrupt may attend an examination or perform any other duty under the act, either method of affording protection is available, and the application should be made to the referee. But, if any of the bankrupt's debts are not dischargeable, the order of protection should be limited in time and the body of the bankrupt

133; *Scott v. McAleese*, 1 Am. B. R. 650; *In re Fife*, 6 Am. B. R. 258, 109 Fed. 880; *In re McCauley*, 4 Am. B. R. 122; *In re Grist*, 1 Am. B. R. 89.

15. Compare *In re Tinker*, 3 Am. B. R. 580, 99 Fed. 79, with *Colwell v. Tinker*, 6 Am. B. R. 434.

16. See *In re Marcus*, ante, which contains a form for an order of pro-

hibition. Compare also forms under "Supplementary Forms," *post*.

17. *Scott v. McAleese*, supra.

18. *In re Seymour*, Fed. Cas. 12,684.

19. See second sentence of General Order XXX. Compare, by way of analogy, General Order XII (3).

returned to the jailer as soon as the examination is completed or the duty performed; unless the arrest post-dated the petition, when, it seems, he should be discharged from imprisonment.<sup>20</sup> No protection can be afforded by any other court to a debtor under arrest for contempt or disobedience of the lawful orders of a court of bankruptcy. Whether, on a contested application, the court will go behind the face of the papers, was a disputed question under the former Act.<sup>21</sup> The better opinion seems to be that it will, *i. e.*, that it is the character of the debt which is the subject of investigation and the court, being a paramount court, should hear all disputed facts. This view seems in accordance with the provisions of General Order XXX.

### III. Subs. b. DETENTION OF BANKRUPTS.

**Purpose of Section.**—It is apparent that the purpose of this section is to provide a means to keep the bankrupt within the district, if the court is satisfied that he is about to leave it to avoid examination.<sup>22</sup> The law of 1867 contained no clause exactly analogous;<sup>23</sup> for detention was not authorized save before adjudication in an involuntary case,<sup>24</sup> and then only as incident to a seizure of the bankrupt's property similar to that now authorized by §§ 3-e and 69-a. The warrant and its purpose were more like the writ of *ne exeat*, referred to in the next paragraph.<sup>25</sup> The present section is, however, for a very different purpose. That the bankrupt is about to depart, that he intends thereby to avoid examination, and that his departure will tend to defeat the proceedings in bankruptcy must satisfactorily appear. Otherwise, a warrant under this subsection cannot be issued.

**Practice.**—The limitations here are important. Such an application can be made only between the time of filing the petition and

<sup>20</sup>. See first sentence of General Order XXX.

<sup>21</sup>. Compare *In re Robinson*, Fed. Cas. 11,939; *In re J. H. Kimball*, Fed. Cas. 7,769, and other like cases, with *In re Williams*, Fed. Cas. 17,700, and *In re Alsberg*, Fed. Cas. 261.

<sup>22</sup>. See section 46 of the Torrey Bankruptcy Bill, S. 1035, Fifty-fifth Congress, introduced by Senator Lindsay, on March 22, 1897, under

which a bankrupt might have been detained if "his departure will delay or hinder the proceeding;" and the reason for the change in the statement of the conferees on the part of the House. Cong. Record, 55th Congress, Vol. I, p. 7205.

<sup>23</sup>. See § 40.

<sup>24</sup>. *Usher v. Pease*, 116 Mass. 440.

<sup>25</sup>. *Griswold v. Hazard*, 141 U. S. 260.

the expiration of one month after the qualification of the trustee; and the bankrupt, if taken into custody, can be detained only ten days. The affidavits of two persons are necessary; they must show facts, not opinions, and must be reasonably conclusive. The bankrupt cannot be actually imprisoned. Within these limitations and on a showing of the facts indicated in the last paragraph, the judge may, on petition or motion, issue a warrant. The bankrupt can, it seems, move for his release, or give bail. As soon as the ten days have elapsed, he must be released. There seems to be no prohibition on second or other like applications, but the court will not permit the use of this process to become persecution. The similarity between the detention here authorized and that made effective through the writ of *ne exeat* will be recognized.<sup>26</sup> The latter is, however, not limited to a detention for the purpose of examination. It has been held that a court of bankruptcy may, under the broad powers conferred by § 2 (15)<sup>27</sup> grant such a writ, and this procedure will usually be resorted to. But a warrant cannot be issued under this subsection solely as a basis for extradition proceedings in another district to bring the bankrupt to the district in which the detention warrant has been issued.<sup>28</sup>

26. See R. S., §§ 717, 5024. And consult *In re Hale*, Fed. Cas. 5,911; *In re Hadlev*, Fed. Cas. 5,894; *In re McKibben*, Fed. Cas. 8,859.

27. *In re Lipke*, 3 Am. B. R. 569, 18 Fed. 970.

28. *In re Ketchum*, 5 Am. B. R. 532.



## SECTION TEN.

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### EXTRADITION OF BANKRUPTS.

§ 10. **Extradition of Bankrupts.**—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

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**Analogous provisions:** None.

**Cross references: To the law:** §§ 2 (13) (14) (15); 9; 29-b; 41-a.

**To the General Orders:** None.

**To the Forms:** None.

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### I. EXTRADITION OF BANKRUPTS.

**When a Bankrupt May be Extradited.**—This section is new. Clearly, only when a warrant for the apprehension of a bankrupt has been issued can extradition proceedings be instituted. Thus, when he has committed one of the offenses mentioned in § 29-b, or has been adjudged in contempt under § 2 (13) (15), or § 41-a; but not, it seems, when the sole purpose of the warrant is to detain him for examination.<sup>1</sup> He must also be found in the district whence extradition is sought. This implies positive identification. Further than this, however, the court need not go. The mere production of the warrant, authenticated either in writing or orally, appears to be sufficient. In this, extradition in bankruptcy seems to differ from extradition for crime.<sup>2</sup>

1. In re Ketchum, 5 Am. B. R. 532.

2. Compare In re Dana, 68 Fed. 886; Callan v. Wilson, 127 U. S. 540; In re Wolf, 27 Fed. 606.

**Practice.**— By the terms of this section, the practice on extradition in bankruptcy is assimilated to that provided by § 1014 of the Revised Statutes.<sup>3</sup> The bankrupt is brought in on a warrant issued by a commissioner on complaint under oath; he may deny identity, or that the warrant was issued, or, if issued, that it was for his apprehension. The commissioner must either discharge him or commit him to custody. If the latter, he may be admitted to bail. If no bail is offered, he must be taken before the judge, who, after inquiry into the facts, may either release him or grant an order or warrant for removal. And the marshal will then deliver him into the custody of the court which issued the original warrant of arrest.<sup>4</sup>

**3.** This section is as follows:

§ 1014. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cog-

nizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

**4.** For practice and forms, see works on Federal Procedure.

## SECTION ELEVEN.

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### SUITS BY AND AGAINST BANKRUPTS.

§ 11. **Suits By and Against Bankrupts.**—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

*b* The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

*c* A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

*d* Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

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**Analogous provisions:** In U. S.: *As to right to maintain an action against a bankrupt*, Act of 1867, § 21, R. S., § 5105; Act of 1841, § 5; *As to stay of suits against a bankrupt*, Act of 1867, § 21, R. S., § 5106; *As to continuance of pending suits by trustee*, Act of 1867, §§ 14, 16, R. S., § 5047; Act of 1841, §§ 3, 5; Act of 1800, § 13; *As to limitations of actions against the trustee*, Act of 1867, §§ 2, 14, R. S., §§ 5056, 5057.

**In Eng.:** *As to stays*, Act of 1883, § 10 (2).

**Cross references:** To the law: §§ 2 (7) (15); 9-a; 47-a (2).

To the General Orders: XII (3).

To the Forms: None.

## SYNOPSIS OF SECTION.

**I. Comparative Legislation and Meaning of Section.****Stays Under Previous Acts.***Differences Between Them and the Present Law.***Stays of Suits Begun After Filing of Petition.****II. Subs. a. Stays of Suits Against Bankrupts.****As Dependent on Dischargeability of Debt.***Power to Stay Should be Exercised with Caution.**Effect of Proof of Debt on Right of Action.***Of Suits or Proceedings in Rem.***To Enforce a Lien.**General Assignments.***Of Suits or Proceedings in Personam.***Illustrative Cases.***Practice.***Whether Application to Judge or Referee.**Papers and Procedure.***Duration of Stays.****III. Subs. b, c. Continuance of Suits.****Where Bankrupt is Defendant.****Where Bankrupt is Plaintiff.****Practice.****IV. Subs. d. Limitation on Suits by Trustee.****Limitation and When it Begins to Run.***When is the Estate Closed.**Illustrative Cases.***I. COMPARATIVE LEGISLATION AND MEANING OF SECTION.**

**Stays under Previous Acts.**—The power to stay suits concerning the person or property of the bankrupt is essential to the orderly administration of a bankruptcy law. This principle has always been recognized in England; and, while it is not yet authoritatively settled, it seems that there even an inferior county court, sitting in bankruptcy, may stay a suit on a debt in a superior, *i. e.*, the High Court.<sup>1</sup> The English statute also deprives a creditor whose debt is provable in bankruptcy of all remedies against the bankrupt, including the right to sue, during the pendency of the pro-

1. Baldwin on Bankruptcy, 9th ed., p. 22.

## § 11.]

## Stays of Suits Begun after Filing of Petition.

ceeding, save with the consent of the court.<sup>2</sup> In this country, for obvious reasons, stays on proceedings in state courts have been regarded with some alarm, and, as a rule, only those authorized by "any law relating to proceedings in bankruptcy" are permitted.<sup>3</sup> The Act of 1841 contained no clause like that now under discussion, but, under it, the assignee was empowered to prosecute or defend all pending suits, and the filing of a claim was deemed a waiver of all other remedies. Not so the law of 1867, which, by a specific grant of power to order stays, supplemented § 720 of the Revised Statutes and rendered the jurisdiction to enjoin both affirmative and virile. There is, however, a marked difference between the provisions of that and the present law.

*Differences Between Them and the Present Law.*—These differences may be summarized thus: Stays under the former law were mandatory, if against a suit on a provable debt brought either before or during the pendency of the proceeding and lasted until the time of discharge, unless there was unreasonable delay in obtaining it; provided, however, that the court might permit the suit to go as far as judgment, thus to measure up the amount of the debt. Stays of suits under the present law are, strictly speaking, confined to actions pending at the time of the bankruptcy, are mandatory if before the adjudication, and discretionary after it, cannot be granted against suits founded on provable debts that are not dischargeable, if granted, put an end to all further proceedings, and only if after the adjudication continue in force to the determination of the bankrupt's right to a discharge.

**Stays of Suits Begun After Filing of Petition.**—If, as has been said, a chief purpose of such stays is to prevent the harassment of the bankrupt by suits, pending a discharge which will be a bar, it would seem that a court of bankruptcy could, in its discretion, restrain a suit begun after the filing of the petition. There was no doubt about this under the law of 1867, as the creditor who proved elected his remedy, and the creditor who did not could not prosecute his suit to judgment.<sup>4</sup> The omission is perhaps significant. Yet, while a suit begun on a provable debt after the bank-

2. Act of 1883, § 9.

3. R. S., § 720.

4. See R. S., §§ 5105, 5106, and compare, however, to the effect that a suit

might be prosecuted, provided it did not reach a judgment, *In re Ghirardelli*, Fed. Cas. 5376. And see *Eyster v. Gaff*, 91 U. S. 521.

## Stays as Dependent on Dischargeability of Debts.

[§ 11a.]

ruptcy would seem but a shot into the air and likely to amount to naught save a liquidation of the debt,<sup>5</sup> the rule that a court of bankruptcy will stay an after-brought suit only when and because directed against possession of the bankrupt's property,<sup>6</sup> apparently relied on as authority for the opposite view in a previous edition of this work, by no means affects the broad doctrine here urged. Nor does the converse rule, that the court will not generally stay such a suit brought for the purpose of asserting a valid lien which attached before the beginning of the proceeding.<sup>7</sup> Nor yet is it necessary to rely wholly on the terms of § 2 (15) for power to enjoin. The stay can be directed to the plaintiff, who, being doubtless a scheduled creditor, is a party to the proceeding; or, under § 2 (6), such a plaintiff can be brought in, and then stayed.<sup>8</sup> Either procedure is well within the principle that, to protect its jurisdiction, a court will enjoin all parties from proceedings looking to the same remedy in another court of concurrent jurisdiction.<sup>9</sup> There are as yet, however, few cases directly in point under the present bankruptcy law.<sup>10</sup>

## II. Subs. a. STAYS OF SUITS AGAINST BANKRUPTS.

**As Dependent on Dischargeability of Debt.**—This is the very basis of jurisdiction. The suit must be founded upon a claim from which a discharge would be a release.<sup>11</sup> The difference between the present § 11 and § 21 of the old law in this regard has already been noted.<sup>12</sup> The words, "from which a discharge would be a release," are construed broadly, and suits not strictly within them are sometimes stayed.<sup>13</sup> The word "suits" is also given a wide meaning. It includes actions at law, suits in equity, and, in fact, any legal proceedings where the personal liability of the

5. *McDonald v. Davis*, 105 N. Y. 508, 113 Fed. 107; *In re Gutman*, 8 Am. B. R. 252, 114 Fed. 1009. And

6. *In re Chambers*, 3 Am. B. R. 537, 98 Fed. 865; *In re Russell et al.*, 3 Am. B. R. 658, 101 Fed. 248. 7. *In re San Gabriel Sanitarium Co.*, 7 Am. B. R. 206, 111 Fed. 892.

8. *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623. 9. *Moran v. Sturgis*, 154 U. S. 256, 273; *Texas & Pac. R. R. Co. v. Johnson*, 151 U. S. 81. 10. *In re Kleinhans*, 7 Am. B. R. 604, 113 Fed. 107; *In re Basch*, 3 Am. B. R. 235, 97 Fed. 761.

11. *In re Katz*, 1 Am. B. R. 19.

12. See p. 122, ante. For debts that are dischargeable and those that are not, see under Section Seventeen of this work.

13. *In re Hilton*, 4 Am. B. R. 774; *In re Basch*, supra. See also *Ex parte Christy*, 3 How. 292.

## § 11a.] Exercise of Power to Stay; Effect of Proof of Debt.

debtor is sought to be fixed.<sup>14</sup> Thus, it embraces legal steps after judgment, such as supplementary proceedings,<sup>15</sup> sheriffs' sales on execution,<sup>16</sup> even the distribution of the proceeds of such sales,<sup>17</sup> as well as a wide range of proceedings discussed later;<sup>18</sup> though, were it not for other sections of the law, it may be doubted whether the word could be extended so far.<sup>19</sup> Where the suit involves nothing but the question of fraud, to which a discharge cannot be pleaded, its prosecution should not be stayed.<sup>19a</sup>

*Power to Stay Should be Exercised with Caution.*—This follows from the very nature of the power. The right to enjoin has often been too broadly expressed.<sup>20</sup> Many of the cases are wayward guides. At the same time, it is impossible to phrase any exact rule. The present tendency is toward limitations on the power, rather than its opposite.<sup>21</sup> Where creditors seek judgments against a bankrupt corporation to enable them to proceed against stockholders upon their unpaid subscriptions, it has been held proper to permit them to prosecute their claims, although actions to enforce such claims were commenced subsequent to the proceedings in bankruptcy against the corporation.<sup>21a</sup>

*Effect of Proof of Debt on Right of Action.*—This was much debated under the former law, which in terms provided that he who proved his debt in bankruptcy waived his right to enforce it by any other legal remedy. But the better opinion was that the waiver endured only until a discharge was granted or refused. The amendatory bill of 1874 made this view also the written law.

14. In re Rosenberg, Fed. Cas. 12,054; McKay v. Funk, 13 N. B. R. 334; Bailey v. Glover, 21 Wall. 342.

15. In re De Long, 1 Am. B. R. 66; In re Kletchka, 1 Am. B. R. 479, 92 Fed. 901; In re De Lany & Co., 10 Am. B. R. 634, 124 Fed. 280.

16. In re Northrop, 1 Am. B. R. 427.

17. In re Kenney, 2 Am. B. R. 494, 95 Fed. 427; In re Lesser, 3 Am. B. R. 815, 100 Fed. 433; affirmed, s. c., 5 Am. B. R. 320, and both reversed in Metcalf v. Barber, 187 U. S. 165, 9 Am. B. R. 36.

18. In re Gutwillig, 1 Am. B. R. 388, 92 Fed. 337; Lea v. West Co., 1 Am. B. R. 261, 91 Fed. 237.

19. See In re Globe Cycle Works, 2 Am. B. R. 447, 456, decided Aug. 7, 1899. And compare In re Southern Loan & Trust Co., 3 Am. B. R. 9, 96 Fed. 514, decided Sept. 5, 1899.

19a. In re Wallock, 9 Am. B. R. 685, 120 Fed. 516.

20. In re Rogers, 1 Am. B. R. 541; In re St. Albans Foundry Co., 4 Am. B. R. 594.

21. In re Ward, 5 Am. B. R. 215, 104 Fed. 985, a case, at least since the amendatory act of 1903, of doubtful authority on the point there decided. Compare In re Currier, 5 Am. B. R. 630.

21a. In re Remington Auto. & Motor Co., 9 Am. B. R. 533, 119 Fed. 441.

That the same is the law to-day,<sup>22</sup> with the exception that a suit may probably be begun and, unless stayed, prosecuted to judgment, is undoubtedly true. So also is the old-time rule that the remedy thus suspended comes into being the moment the discharge is granted or denied.<sup>23</sup> But the state court does not lose jurisdiction.<sup>24</sup> The stay is directed to the suitor, not the court, and the latter may go on if the cause is moved by the person enjoined, and a judgment resulting will be valid.<sup>25</sup> The remedy of a party thus aggrieved is in contempt proceedings. It is important, however, to note that, if a stay is not granted and the suit proceeds and judgment is entered *after* the discharge, the latter cannot be set up as a release to the judgment.<sup>26</sup>

**Of Suits or Proceedings in Rem.**— The general rule is that the court that first acquires jurisdiction of the *res* will retain it. Thus, a federal court will restrain a replevin creditor proceeding in a state court against property in the custody of the federal court,<sup>27</sup> but will refuse a stay in most cases where the state court is in possession,<sup>28</sup> or where the bankrupt had no legal or equitable title to the property sought to be replevined.<sup>28a</sup> But the rule yields, however, where the possession of the state court is (1) the result of a fraud on the law, or (2) of a lien declared void or voidable under the law. But if the lien is by a judgment creditor's suit begun more than four months before the bankruptcy, a stay will not be granted.<sup>29</sup> Where

<sup>22</sup>. For instance, see *Reed v. Equitable Trust Co.*, 8 Am. B. R. 242.

<sup>23</sup>. In *re Rosenberg*, Fed. Cas. 12,054; In *re Rosenthal*, 5 Am. B. R. 799, 108 Fed. 368.

<sup>24</sup>. *Bindseil v. Smith*, 5 Am. B. R. 40.

<sup>25</sup>. *Flanagan v. Pearson*, 14 N. B. R. 37; *Ewart v. Schwarz*, 48 N. Y. Super. 390; *Wood v. Hazen*, 15 N. B. R. 491; In *re Irving*, Fed. Cas. 7,073.

<sup>26</sup>. *Dimock v. Revere Copper Co.*, 117 U. S. 559; *McDonald v. Davis*, 105 N. Y. 508.

<sup>27</sup>. In *re Russell*, 3 Am. B. R. 658, 101 Fed. 248.

<sup>28</sup>. *Carter v. Hobbs*, 1 Am. B. R. 215, 92 Fed. 594; In *re Price*, 1 Am. B. R. 606, 92 Fed. 987; *Keegan v. King*, 3 Am. B. R. 79, 96 Fed. 758; In *re Seebold*, 5 Am. B. R. 358, 105 Fed. 910; In *re Russell*, supra. Com-

pare also In *re Neely*, 5 Am. B. R. 836, 108 Fed. 371, as modified by s. c. on appeal, 7 Am. B. R. 312, 113 Fed. 210.

<sup>28a</sup>. In *re Smith*, 9 Am. B. R. 590, 119 Fed. 1004; *Matter of Kanter & Cohen*, 9 Am. B. R. 372, 121 Fed. 984, 58 C. C. A. 260.

<sup>29</sup>. *Metcalf v. Barber*, 187 U. S. 165, 9 Am. B. R. 30, reversing In *re Lesser*, 5 Am. B. R. 320, and s. c., 3 Am. B. R. 815; *White v. Thompson*, 9 Am. B. R. 653, 119 Fed. 868, 56 C. C. A. 398, holding that an injunction restraining proceedings in the disposition of property duly levied on under an execution, issued upon a judgment more than a year prior to the adjudication in bankruptcy of the debtor is unwarranted. See also *Nat. Bank v. Hobbs*, 9 Am. B. R. 190, 118 Fed. 626.



a proceeding was commenced long prior to the proceedings in bankruptcy, and the property in controversy was under the control and in the possession of a receiver appointed by the state court, a bankruptcy court cannot enjoin the proceedings or order the property turned over to the trustee in bankruptcy.<sup>29a</sup>

*To Enforce a Lien.*—Such stays usually are sought either to prevent the enforcement of an execution or an attachment levied within the four months' period, or the foreclosure of a valid mortgage. If the former, there seems little doubt about the power to halt the lien creditor or of the wisdom of exercising it.<sup>29b</sup> If the latter, while the power exists, the mortgaged premises being in the custody of the court,<sup>30</sup> yet, provided the mortgage is valid, it will not as a rule be exercised, and certainly not unless it appears that the equity of redemption vested in the trustee is of some value.<sup>31</sup> The decisions under the former class of cases are fairly uniform,<sup>32</sup> and, where there is a difference, now that the doctrine of *Bardes v. Bank* has been eliminated, turn, as a rule, on whether the action sought to be stayed is or rests upon a transaction which is void or voidable under the present law. Those under the latter class, declaring against the exercise of jurisdiction and remitting the party who seeks the stay to the state court, are equally uniform;<sup>33</sup> and the earlier cases *contra*<sup>34</sup> are no longer controlling. Nor was this latter result appreciably affected by *Bardes v. Bank*.<sup>35</sup> How-

29a. *Pickens v. Dent*, 9 Am. B. R. 47, 187 U. S. 177, affirming 5 Am. B. R. 644, 106 Fed. 663.

29b. *In re Eastern Com. & Imp. Co.*, 12 Am. B. R. 305, 129 Fed. 847.

30. *Quære*: Whether the mortgagee, being a secured creditor, is not, under § 57-h, a party who is already within the jurisdiction of the court of bankruptcy?

31. *In re Sabine*, 1 Am. B. R. 315. Compare *In re Pittelkow*, 1 Am. B. R. 472, 92 Fed. 901.

32. *In re Kimball*, 3 Am. B. R. 161, 97 Fed. 29; *Bear v. Chase*, 3 Am. B. R. 746, 99 Fed. 920; *In re Seebold*, supra; *In re Lesser*, supra; *In re Kenney*, 5 Am. B. R. 355, 105 Fed. 897; *In re Tune*, 8 Am. B. R. 285, 115 Fed. 906. Most of the cases *contra* rest on *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163, and since the amendatory act of

1903, are no longer the law (for instance, *In re Wells*, 8 Am. B. R. 75, 114 Fed. 222, and *In re Shoemaker*, 7 Am. B. R. 437, 112 Fed. 648). But see *In re Ogles*, 1 Am. B. R. 671, and *In re Franks*, 2 Am. B. R. 634, 95 Fed. 635. Even were this not so, the power to enjoin the consummation of a fraud on the law is by no means negated by *Bardes v. Bank*. Compare *Bryan v. Bernheimer*, 175 U. S. 274, 5 Am. B. R. 623.

33. *In re Holloway*, 1 Am. B. R. 659, 93 Fed. 638; *Heath v. Shaffer*, 2 Am. B. R. 98, 93 Fed. 647; *In re Gerdes*, 4 Am. B. R. 346, 102 Fed. 318; *In re Porter*, 6 Am. B. R. 259.

34. *In re Sabine*, ante; *In re Pittelkow*, 1 Am. B. R. 472, 92 Fed. 901; *In re San Gabriel Sanitarium Co.*, 4 Am. B. R. 197, 102 Fed. 310.

35. Compare, however, *In re San Gabriel Sanitarium Co.*, 7 Am. B. R.

ever, in extreme cases, such as was *In re Sabine*, and in cases where the mortgage itself is voidable under the terms of the law, the right to stay will usually be exercised. Where the lien creditor voluntarily makes himself a party to the proceedings,<sup>36</sup> as when he appears at the first meeting and asks that his security be ascertained for the purpose of voting on that part of his debt which may be unsecured, the rule is, of course, different. Such a creditor may later be stayed. But not, if the suit is a creditor's bill of long standing.<sup>37</sup> A suit to enforce a mechanic's lien against real property of the bankrupt may be brought against the trustee without leave of the court.<sup>37a</sup>

*General Assignments.*—Prior to *Bardes v. Bank*, the cases were uniform in holding that, a general assignment being an act of bankruptcy and a constructive fraud on the law, the general assignee might be halted by an injunction from the court of bankruptcy.<sup>38</sup> Whatever doubt resulted from that case was eliminated by the same court's decision in *Bryan v. Bernheimer*.<sup>39</sup> Nor was the doubt restored by that court's decision in *Louisville Trust Co. v. Cominger*;<sup>40</sup> a case which applied the *Bardes* rule only to the assignee and his attorneys and that, too, only when they had become vested with an adverse title prior to the bankruptcy. Since the amendatory act of 1903, *Bardes v. Bank* being no longer the law, the question is stripped of all dogmatic limitations. There can now be no doubt about the power of a court of bankruptcy to restrain general assignment proceedings; indeed, it becomes its duty *proprio motu*, at once a petition, especially an involuntary petition, is filed.

**Of Suits or Proceedings in Personam.**—Much that goes before might be repeated here. Two classes of proceedings are, however, peculiarly against the person, (*a*) ordinary suits for the collection of simple debts, and (*b*) proceedings which may result in the attach-

206, 111 Fed. 892, where, on reargument, the Circuit Court of Appeals of the Ninth Circuit supersedes its former opinion, *supra*, on this ground.

36. *In re Riker*, 5 Am. B. R. 720, 107 Fed. 96.

37. *Pickens v. Roy*, 187 U. S. 177, 9 Am. B. R. 47.

37a. *In re Smith*, 9 Am. B. R. 603, 121 Fed. 1014.

38. *In re Gutwillig*, 1 Am. B. R. 78, 90 Fed. 475; affirmed, 1 Am. B. R. 388, 92 Fed. 337; *Lea v. West*, 1 Am. B. R. 261, 91 Fed. 237; *In re M. Solomon & Co.*, 2 N. B. N. Rep. 460.

39. 181 U. S. 188, 5 Am. B. R. 623.

40. 184 U. S. 18, 7 Am. B. R. 305. See also *In re Carver*, 7 Am. B. R. 539, 113 Fed. 128.

ment and detention of the body of the debtor. Stated broadly, the former, subject to limitations discussed *ante*, especially where the debt proceeded on is the result of a fraudulent preference,<sup>41</sup> will always be stayed. On the other hand, the latter class of cases will rarely be stayed, for the reason that, as a rule, arrest on civil process rests on obligations which are not dischargeable in bankruptcy.<sup>42</sup> To this generalization there are, of course, exceptions, as where the remedy on a simple contract debt given by the state law includes arrest,<sup>43</sup> or the well-known Kentucky alimony case, where a stay was granted on a state court's enforcement of its mandate by contempt.<sup>44</sup> An injunction restraining further proceedings in an action in a state court operates in restraint of proceedings in such court to punish the bankrupt for an alleged contempt committed before the adjudication in bankruptcy.<sup>45</sup>

*Illustrative Cases.*—In addition to the cases already cited, those found in the foot-note will prove suggestive.<sup>46</sup> The practitioner is, however, cautioned against a too confident reliance on them. Some are mere judicial guesses, dependent on peculiar facts, and are thus controlling only on the case whose name they bear.

**Practice.**—The jurisdiction conferred on the court of bankruptcy by this section is not exclusive. Application may be made to the state court, and the mandatory provisions of the section are as binding on that court as on the federal court.<sup>47</sup> Ordinarily, the application should be made in that court in the first instance.<sup>48</sup> In that event, the practice will be that provided by the state law. The

41. In re Nathan, 92 Fed. 590.

42. For instance: In re Cole, 5 Am. B. R. 780, 106 Fed. 837, and, for what debts are not discharged, see generally Section Seventeen of this work.

43. In re Grist, 1 Am. B. R. 89.

44. In re Houston, 2 Am. B. R. 107, 94 Fed. 119; on appeal, Wagner v. Houston, 4 Am. B. R. 596, 104 Fed. 133.

45. In re Fortunato, 9 Am. B. R. 630, 123 Fed. 622. See In re De Lany & Co., 10 Am. B. R. 634, 124 Fed. 280.

46. *Suits or acts which have been restrained:* In re Jackson, 2 Am. B. R. 501, 94 Fed. 797; In re McKee, 1 Am. B. R. 311; In re Adams, 1 Am.

B. R. 94; In re Northrop, 1 Am. B. R. 427; In re Booth, 2 Am. B. R. 770, 96 Fed. 943; In re St. Albans Foundry Co., 4 Am. B. R. 594; Vietor v. Lewis, 1 Am. B. R. 667; In re Krinsky, 7 Am. B. R. 535, 112 Fed. 658.

*Suits or acts where restraint has been refused:* Reid v. Cross, 1 Am. B. R. 34; In re Sullivan, 2 Am. B. R. 30; In re Greater American Exposition Co., 4 Am. B. R. 486, 102 Fed. 986; In re Meyers, 1 Am. B. R. 347; Mather v. Coe, 1 Am. B. R. 504, 92 Fed. 333.

47. In re Rosenberg, Fed. Cas. 12,054; In re Metcalf, Fed. Cas. 4,494.

48. In re Geister, 3 Am. B. R. 228, 97 Fed. 322.

production of a certified copy of the petition or of the adjudication will be enough to establish the fact that such a proceeding has been begun. But it is in no sense the duty of the state court to stay merely because it hears of the bankruptcy of a suitor. It must be informed of the facts by proper pleadings.<sup>49</sup>

*Whether Application to Judge or Referee.*—If the application is made to the court of bankruptcy, it should be made to the judge if there has yet been no order of reference; otherwise, to the referee in charge.<sup>50</sup> Under the former law, the register's functions were more clerical than judicial and he had no such power. It has been thought that General Order XII (3) is a limitation on the power to enjoin implied from § 38-a (4); but the latter authorizes courts of bankruptcy, and not the Supreme Court, to abridge this power. Further, cases *contra*<sup>51</sup> must be considered at least impliedly overruled by *In re Nugent*, the power to issue an order to show cause why property should not be restored being an analogous exercise of jurisdiction and of a higher class than a mere stay. Where, however, the courts of bankruptcy have by their rules restricted the power of referees to the granting of temporary restraining orders only,<sup>52</sup> care should be taken to ask no more than the referee can grant.

*Papers and Procedure.*—Save in the interval between the filing of the petition and the adjudication, a stay is always discretionary. Suits, except asserting remedies incident to valid liens, should, as a rule, be stayed. Unless there has been an abuse of discretion, the stay will not be interfered with on appeal.<sup>53</sup> Application is usually made by a petition setting out the jurisdictional facts, such as the name of the suit, in what court, for what it is brought, the names of the persons sought to be enjoined, of their attorneys of

49. *Johnson v. Bishop*, Fed. Cas. 7,373.

50. See § 38-a (4).

51. For instance, *In re Steuer*, 5 Am. B. R. 209, 104 Fed. 976.

52. Thus, on "When a motion for an injunction is pending or is about to be made the referee may, in order to prevent injury to the property of the bankrupt, or otherwise, grant a temporary restraining order staying proceedings until the hearing and decision of said motion. In case all parties in

interest agree that said motion be heard by the referee in charge, they may file with the referee a written stipulation to that effect. The decision of the referee on such motion shall be filed with the clerk, and if the referee decides that an injunction shall issue, an order to that effect may be made by the judge." (Rule XXI, Northern and Western Districts of New York.)

53. *In re Lesser*, 3 Am. B. R. 758, 99 Fed. 913.

§ 11a.]

Application for Stay; Papers and Procedure.

record, and the like, and, if on information and belief, accompanied by sustaining affidavits,<sup>54</sup> the reasons why the stay should be granted must clearly appear. If there be a trustee, he should apply, though, if he refuses or neglects so to do, or if a trustee be not yet appointed, any party in interest, including the bankrupt, may do so. Before adjudication, the petitioning creditors are the proper persons, but any party interested in the proceeding may also apply. The stay is granted *ex parte*, and endures until it is modified or dissolved, unless limited in time by its terms. If a stay proper, as distinguished from a mere temporary injunction coupled with an order to show cause, the granting of it may be indorsed on the petition by the judge or the referee, and the clerk must then issue a writ of injunction, which, in turn, must be served by the marshal, in the same manner as other federal writs. If a temporary restraining order, the practice of the state courts usually controls as to recitals, the signature of the judge or referee, and the method of service.<sup>55</sup> Omnibus stays are not frequent and the writ or order will, as a rule, be addressed to the party stayed *eo nomine*; however, stays directed generally "to all other persons" seem to bind all persons served.<sup>56</sup> Whether, if the person to be stayed is not a party to the proceeding, he must be brought in by a subpoena served at the same time, is a question. There is high authority for the practice,<sup>57</sup> even under the present law; but the wording of the subsection under discussion does not seem to make it necessary. In actual practice, it is rarely essential, and much less rarely done. Motions to modify or vacate are made in the usual way, on notice and affidavits, and are often subject to district rules or the practice of the local state courts. How far courts will investigate the merits of contested applications depends largely on the conscience and industry of the judge or referee. The better authority seems to be that a court of bankruptcy will, if necessary, determine such merits, even swearing witnesses or ordering a referee to ascertain the facts. It will, indeed must, determine whether the debt is dischargeable or not.<sup>58</sup> To do this, it must often declare

54. In re Keiler, Fed. Cas. 7,647.

55. Useful forms will be found under "Supplementary Forms," post.

56. In re Lady Bryan Mining Co., Fed. Cas. 7,980.

57. Bryan v. Bernheimer, ante.

58. In re Basch, 3 Am. B. R. 235, 97 Fed. 761.

the legal effect of pleadings in the state court, and sometimes of a judgment there granted.<sup>59</sup>

**Duration of Stays.**— If granted before the adjudication, a stay is dissolved by the adjudication, though, of course, it may be renewed. If granted after the adjudication, it must be in the words of the statute; these clearly indicate its duration.<sup>60</sup> If the year goes by and the bankrupt obtains the extension permitted by § 14-a, it is questionable whether another stay could be granted under the terms of this section of the law; but it probably could under the general equity powers of the court, discussed *ante*. It is thought, however, that the words “the question of such discharge is determined” are sufficient to embrace the time consumed on an appeal, seasonably taken and diligently prosecuted. Once the discharge is granted or refused, the stay is dissolved. No order to that effect is required. Better practice, however, suggests the application for and entry of such an order, though it is the duty of the court to make such entry, in any event.<sup>61</sup>

### III. Subs. b, c. CONTINUANCE OF SUITS.

**Where Bankrupt is Defendant.**— The words here are not the same as those of the former law,<sup>62</sup> but their effect is similar.<sup>63</sup> One option is with the trustee—he may or may not decide to defend<sup>64</sup>—though, when in doubt, he should report at a meeting of creditors for instructions. The other option is with the court; it may,<sup>65</sup> but need not, order the trustee to intervene. The state court, on the other hand, cannot compel him to intervene.<sup>66</sup> He can plead to the jurisdiction, or make any defense which the bankrupt could have made, or even any defense which any creditor could have asserted affirmatively.<sup>67</sup> Once a party to such suit, he is bound by

59. *Burnham v. Pidcock*, 5 Am. B. R. 590; *Knott v. Putnam*, 6 Am. B. R. 80, 107 Fed. 907.

60. “Until twelve months after the date of such adjudication, or, if within such time, such person applies for a discharge, then until the question of such discharge is determined.”

61. *In re Rosenthal*, 5 Am. B. R. 799, 108 Fed. 368.

62. Act of 1867, § 16, R. S., § 5047.

63. *Price v. Price*, 48 Fed. 823.

64. *Traders' Bank v. Campbell*, 14 Wall. 87; *Reade v. Waterhouse*, 52 N. Y. 587.

65. *In re Porter & Bros.*, 6 Am. B. R. 259, 109 Fed. 111.

66. *Oliver v. Cunningham*, Fed. Cas. 10,493. But compare *Bear v. Chase*, 3 Am. B. R. 746, 99 Fed. 920.

67. *Loudon v. Blandford*, 56 Ga. 150; *Sanford v. Sanford*, 58 N. Y. 67; *Knox v. Bank*, 12 Wall. 379.

§ 11b, c.]

Where Bankrupt is Plaintiff.

the judgment therein.<sup>68</sup> If the judgment is already entered, and the state court refuses to open it on a motion of the trustee, the court of bankruptcy cannot, it seems, force the state court to open the case by restraining the enforcement of its judgment.<sup>69</sup> It would also seem that a trustee, when once a party, could, on showing the required facts, secure a removal of the cause to the proper federal court; there are, however, no cases in point. If a trustee does not intervene, he is bound by the judgment to the same extent that any party acquiring an interest pending suit would be bound.<sup>70</sup>

**Where Bankrupt is Plaintiff.**—The words of this subsection are strikingly similar to those of the law of 1867.<sup>71</sup> They have, however, been given a somewhat limited meaning. Thus, only such suits as may be beneficial to the estate should be continued by the trustee.<sup>72</sup> If, then, actions not beneficial to the estate are pending, what may the bankrupt do? The authorities are not uniform.<sup>73</sup> The analogy between such a right of action and any other valueless or burdensome property is striking, and, it is thought, on proper application to the referee in charge, the trustee may be excused from prosecuting such a suit, and the bankrupt authorized to do so for his own benefit.<sup>73a</sup> If the trustee intervenes, the suit will be continued in his name;<sup>74</sup> but the trustee is liable only for costs after he intervenes, and for costs personally only when guilty of mismanagement or bad faith.<sup>75</sup>

**Practice.**—Application should first be made by petition or motion for leave to ask to intervene; and this application should, as a rule, be heard at a meeting of creditors. It may, however, be granted *ex parte*. How far an adverse party in the state court should be heard in opposition to the motion is an open question. He certainly

68. In re Skinner, 3 Am. B. R. 163, 97 Fed. 190; In re Van Alstyne, 4 Am. B. R. 42, 100 Fed. 929.

69. In re Franklin, 6 Am. B. R. 285, 106 Fed. 666, affirmed sub nom. Jaquith v. Rowley, 188 U. S. 620, 9 Am. B. R. 525. Compare Neiman v. Shoolbraid, 2 N. B. N. Rep. 668.

70. Thatcher v. Rockwell, 105 U. S. 467.

71. Act of 1867, § 16, R. S., § 5047.

72. In re Haensell, 1 Am. B. R. 286, 91 Fed. 355; In re Franks, 2 Am. B. R. 634, 95 Fed. 635.

73. Towle v. Davenport, 16 N. B. R. 478; Noonan v. Orton, 12 N. B. R. 405; Gilmore v. Bangs, 55 Ga. 403; Sutherland v. Davis, 42 Ind. 26.

73a. Griffin v. Mutual Life Ins. Co., 11 Am. B. R. 622, 119 Ga. 664, 46 S. E. 870.

74. Ames v. Gilman, 51 Mass. 239.

75. Norton v. Switzer, 93 U. S. 355; Reade v. Waterhouse, 52 N. Y. 587.

should not, if he is not a creditor, and any effort on his part summarily to determine the controversy on the merits should be checked; the state court is the forum for such determination. Permission once granted, the scene shifts to the state court, and the application there will, of course, be in accordance with the rules and practice of that court.<sup>76</sup> Throughout, the practice under these subsections is closely analogous to that where a trustee initiates a suit, discussed under the appropriate sections, *post*.<sup>77</sup>

#### IV. Subs. d. LIMITATION ON SUITS BY TRUSTEE.

**Limitation and When it Begins to Run.**—This subsection has reference to suits initiated by the trustee, rather than those pending at the time of the bankruptcy.<sup>78</sup> It is similar to the corresponding clause under the Act of 1867 in the period only, two years. The time under that statute began to run when the cause of action accrued in or against the assignee. The time does not now begin to run until "the estate has been closed."<sup>79</sup> This subsection constitutes an arbitrary limitation on suits, as to computation of time at least superseding all statutes, whether state or federal,<sup>80</sup> provided the action is not barred by the state statute at the time the petition in bankruptcy was filed.<sup>80a</sup> It seems also that the character of the suit is immaterial, provided it amounts to the prosecution of a demand in a court of justice,<sup>81</sup> in respect to the property or rights of property of the bankrupt.<sup>82</sup> It applies also to writs of error sued out to review a state judgment, as well as to suits initiated by the trustee.<sup>83</sup> It does not apply to an application to reopen a case upon the ground that the proceeding was closed before the estate was fully administered.<sup>83a</sup>

Under familiar principles, this limitation does not affect jurisdictions; to be available, it must be pleaded.<sup>84</sup>

<sup>76</sup>. Bank of Commerce v. Elliott, 6 Am. B. R. 409.

<sup>77</sup>. See Sections Sixty, Sixty-seven, and Seventy of this work.

<sup>78</sup>. But compare Maybin v. Raymond, Fed. Cas. 9,338.

<sup>79</sup>. For a somewhat remarkable example of the effect of the limitation under the former law, see Scott v. Devlin, 89 Fed. 970.

<sup>80</sup>. Freeland v. Holloman, Fed. Cas. 5,081.

<sup>80a</sup>. Sheldon v. Parker, 11 Am. B. R. 152 (Neb.), 92 N. W. 923.

<sup>81</sup>. Bailey v. Glover, 21 Wall. 342; Ames v. Gilman, ante; Union Canal Co. v. Woodside, 11 Pa. St. 176.

<sup>82</sup>. In re Conant, Fed. Cas. 3,086; Stevens v. Hauser, 39 N. Y. 302.

<sup>83</sup>. Jenkins v. Bank, 106 U. S. 571; Walker v. Townner, Fed. Cas. 17,089.

<sup>83a</sup>. Matter of Paine, 11 Am. B. R. 351, 127 Fed. 246.

<sup>84</sup>. Chemung Bank v. Judson, 8 N. Y. 254.



§ 11d.]

When Estate is Closed.

*When is the Estate Closed?*— This phrase is new. It surely does not mean the date of the discharge or refusal to discharge. Nor yet does it mean the day the referee remits the papers of a closed case to the clerk.<sup>85</sup> It rather refers to the date when the final decree approving the trustee's account and discharging him is granted.<sup>86</sup> Even this is, however, not accurate, for in no-asset bankruptcies, no trustee may be appointed, and yet a cause of action may develop; while in many cases when a trustee is appointed, he finds himself unable to find assets and, there being no funds with which to pay the expenses incident to a meeting for his discharge, files no report and is not discharged. There are as yet no decisions construing the meaning of this phrase. It is suggested that, where no trustee is appointed, the two years will begin to run from the day when the order dispensing with a trustee is granted, and that, when a trustee is appointed who does not report or seek a final discharge, it will not begin until such a discharge is granted. It has been held that where an estate is declared closed, but is subsequently reopened, the two-year period begins to run from the subsequent closing of the estate.<sup>86a</sup>

*Illustrative Cases.*— Besides those referred to in the foot-notes, many valuable precedents will be found in the digests covering the law of 1867.<sup>87</sup>

85. See § 39-a (7).

86. See § 2 (8).

86a. Bilafsky v. Abraham, 183 Mass. 401, 67 N. E. 318.

87. See vol. 6, American Digest, Century edition, "Bankruptcy," §§ 430-443.

## SECTION TWELVE.

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### COMPOSITIONS, WHEN CONFIRMED.

**§ 12. Compositions, when Confirmed.**— *a* A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

*b* An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

*c* A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

*d* The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

*e* Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

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**Analogous provisions:** In U. S.: R. S., § 5103A (Act of June 22, 1874).

In Eng.: Act of 1890, § 3, which supersedes Act of 1883, § 18. See also Act of 1883, § 23. See also Deeds of Arrangement Acts of 1887 and 1900.

§ 12.]

Synopsis of Section.

**Cross references: To the law:** §§ 2 (9); 13; 14-c; 17-a; 21-f-g; 25-a; 29-b (5); 38-a (4); 40-a; 48-a; 58-a (2); 66; 70-f.

**To the General Orders:** XII (3), XXIX, XXXII.

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## SYNOPSIS OF SECTION.

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**I. HISTORY AND COMPARATIVE LEGISLATION.**

**The English System.**—Not until 1825, was a composition with creditors permitted in England, nor did this first statute discharge the debts of dissentient creditors. The Act of 1849, which required the bankrupt to make a *cessio bonorum*, provided for a discharge available against all creditors whether consenting or not. The Act of 1869, § 126, is concededly the progenitor of our system of composition. Since then, two statutes have been passed in England, that of 1883 and that of 1890. The latter repeals the former's provisions concerning compositions, and is now the law. By it, in connection with § 23 of the Act of 1883, a scheme of composition may be offered either between the entry of the receiving order (petition) and the adjudication, or after that date. When the offer is after that date, the practice seems not unlike our own; but a composition outside of, *i. e.*, before an actual bankruptcy, is not possible under our law.<sup>1</sup> The English statutes also provide for "deeds of arrangement" with creditors, a procedure something like those of our state insolvency laws that require the assent of creditors in advance.<sup>2</sup> In actual practice, these deeds of arrangement are more general than compositions proper.<sup>3</sup> In England schemes of arrangement as distinguished from compositions are possible even after bankruptcy proceedings are begun.

**Continental Systems.**—The laws of the continental countries distinguish between compositions without the relinquishment of assets, and compositions with relinquishment. The first class differs from the English method in that it cannot take place until after a bankruptcy proceeding has been begun, and results in a part payment

1. Compare § 23, Act of 1883, with § 3, Act of 1890.

2. See §§ 2149-2187, N. Y. Code of Civil Procedure.

3. See Deeds of Arrangement Acts of 1887 and 1890. The popularity of

deeds of arrangement in England is, from our point of view, difficult to understand. Our insolvency laws, requiring the assent in advance of creditors, are practically dead letters.

and the creation of a "debt of honor" for the balance, the bankrupt being restored to his business, but compelled to perform the terms of his composition agreement. In effect, this is merely an extension, but, when consented to by certain percentages of the creditors, is binding on all. It is, on the Continent, decidedly the more general and more popular method. The other kind of composition resembles that in vogue here, but seems to be possible only in France and Greece. Besides, some countries permit an arrangement with creditors before bankruptcy, to prevent or avoid bankruptcy, and, therefore, properly called "preventive compositions." These correspond to the English deeds of arrangement, either in or out of the proceeding proper, if made before the actual adjudication.<sup>4</sup> The modern tendency is towards arrangements or compositions between the creditor and the debtor, as distinguished from the harsher rules of the older bankruptcy laws. The section now under discussion will, therefore, become increasingly important as the years go on.

**Our System under Act of 1874.**—Our first and second bankruptcy laws did not provide for compositions. Neither did the law of 1867, until amended by the Act of June 22, 1874.<sup>5</sup> The corresponding section of the present law is not only more terse, but, in effect, in several particulars unlike that of the law of 1874. The latter, and the adjudicated cases under it, are, therefore, not always in point. Its main features should, however, be understood and will be briefly outlined here, the foot-notes indicating the leading cases. The discussion of the present section, *post*, is confined, as far as possible, to the meaning of the words of the statute, whether or not already interpreted by the courts.

*Chief Elements.*—A composition could be offered in a pending proceeding either before or after the adjudication.<sup>6</sup> If offered, a meeting of creditors was called,<sup>7</sup> at which the debtor was obliged to be present and answer all inquiries made of him, and also to

4. The writer is greatly indebted in this connection to "Bankruptcy, a Study in Comparative Legislation," by S. Whitney Dunscomb, Jr., Esq., of the New York Bar; being No. 2, Vol. II, of the Columbia College Studies in History, Economics, and Public Law.

5. The parentage of this act is made clear in *In re Scott*, Fed. Cas. 12,519, where the English and Ameri-

can laws on compositions are set out in parallel columns.

6. *In re Reiman*, Fed. Cas. 11,673; affirmed, s. c., Fed. Cas. 11,674; *In re Morris*, Fed. Cas. 9,824; *In re Odell*, Fed. Cas. 10,427.

7. *In re Spades*, Fed. Cas. 13,196; *In re Haskell*, Fed. Cas. 6,192; *In re Spencer*, Fed. Cas. 13,229; *Leibke v. Thomas*, 116 U. S. 605.

produce a statement of assets and liabilities with the names and addresses of his creditors.<sup>8</sup> At such meeting, a resolution accepting the proposed composition became operative if passed by a majority in number and three-fourths in amount of creditors present or represented,<sup>9</sup> and binding if confirmed by the signatures of the debtor and two-thirds in number and one-half in value of all his creditors.<sup>10</sup> Creditors in fifty dollars or less were counted as to amount but not as to number;<sup>11</sup> and secured creditors were not counted unless they relinquished their security.<sup>12</sup> The resolution, if thus operative and confirmed, with a statement of assets and liabilities,<sup>13</sup> was submitted to the judge, who thereupon called a meeting of creditors,<sup>14</sup> and, if (a) satisfied that the resolution was lawfully passed,<sup>15</sup> and (b) that it was for the best interests<sup>16</sup> of all concerned, caused it to be recorded. A composition once agreed to could be varied by a similar procedure.<sup>17</sup> Compositions provided for the *pro rata* satisfaction in money of all debts not secured or entitled to priority.<sup>18</sup> When accepted, they were binding on all creditors scheduled in the statement produced by the debtor at the meeting at which the resolution was passed,<sup>19</sup> and could be enforced by the court summarily or by contempt proceedings.<sup>20</sup> If a composition was not ordered, or, when ordered could not be carried out, the bankruptcy proceeding went on.<sup>21</sup>

8. In re Haskell, ante; In re Holmes, post; In re Dobbins, Fed. Cas. 3,943; In re Proby, Fed. Cas. 11,439; In re Little, Fed. Cas. 8,392.

9. In re Holmes, Fed. Cas. 6,632; In re Spades, ante; In re Gilday, Fed. Cas. 5,422; Ex parte Jewett, Fed. Cas. 7,303; In re Keller, Fed. Cas. 7,654.

10. In re Gilday, supra; In re Spillman, Fed. Cas. 13,242; In re Scott, Fed. Cas. 12,519; Home Nat. Bank v. Carpenter, 129 Mass. 1.

11. In re Wald, Fed. Cas. 17,054.

12. In re Spades, ante; In re Van Auken, Fed. Cas. 16,828; In re O'Neil, Fed. Cas. 10,528; Flower v. Greenbaum, 50 Fed. 190.

13. In re Haskell, ante.

14. In re Scott, Fed. Cas. 12,519.

15. In re Sawyer, Fed. Cas. 12,395; In re Walshe, Fed. Cas. 17,118; In re Cavan, Fed. Cas. 2,528; In re Greenbaum, Fed. Cas. 5,769.

16. In re Haskell, ante; In re Weber Furniture Co., Fed. Cas. 17,330; In re Reiman, ante; In re Whipple, Fed. Cas. 17,513; In re Welles, Fed. Cas. 17,377.

17. In re McDowell, Fed. Cas. 8,776; In re Reiman, ante.

18. In re Reiman, ante; In re Langdon, Fed. Cas. 8,058; In re Louis, Fed. Cas. 8,528; In re Clapp, Fed. Cas. 2,785; In re McNab, Fed. Cas. 8,906; In re Hurst, Fed. Cas. 6,925; In re Wilson, Fed. Cas. 17,781.

19. In re Hurst, supra; In re Reiman, ante; In re Lytle, Fed. Cas. 8,650; In re Bechet, Fed. Cas. 1,210; In re Hamlin, Fed. Cas. 5,994.

20. In re McKeon, Fed. Cas. 8,858; In re Tooker, Fed. Cas. 14,096; In re Renisen, Fed. Cas. 11,698; In re Waetzfelder, Fed. Cas. 17,048.

21. In re Bayly, Fed. Cas. 1,144; Bidwell v. Bidwell, 92 Pa. St. 61; Whittemore v. Stephens, 48 Mich. 573; In re Kohlsaat, Fed. Cas. 7,918.

## § 12.] The Present System; Constitutionality; Who May Offer Composition.

**The Present System.**—The more important changes are discussed later. A few of them are: (1) there can now be no composition until after adjudication and a meeting of creditors; (2) it cannot be offered until the bankrupt has filed his schedules and been examined, and the proposed terms have been accepted in writing by a majority in number and amount of all claims allowed, and the consideration to be paid to creditors and the money necessary to pay debts entitled to priority and the expenses of administration shall have been deposited in court; (3) there are now three available objections to a composition, the first only being the same as that under the former law, and any available objection to the debtor's discharge being equally effective to prevent a composition. The court, and not the debtor, distributes the consideration. The practice, too, is necessarily different. Further, the section is silent as to some things specifically stated in the former law.

**Constitutionality.**—This objection was raised to the Act of 1874. But, if the present section amounts, as it does, to a *cessio bonorum*, whence each creditor obtains substantially as great a *pro rata* as he would through distribution in bankruptcy, the sections on compositions are clearly within the power given Congress to establish a uniform system of bankruptcy.<sup>22</sup> Nor does the fact that, in compositions, the question whether the bankrupt shall be released from his debts depends upon a majority vote by his creditors, render the law unconstitutional. The discharge and the manner of awarding it are mere incidents.<sup>23</sup> The essential purpose of bankruptcy laws is a *pro rata* distribution of assets.<sup>24</sup>

**How Construed.**—Since it is in derogation of the common law, and compels any dissenting creditors to accept the percentage accepted by the majority and deprives them of their remedies on the balance thereafter, this section is strictly construed.<sup>25</sup>

**Who May Offer Composition.**—Any "bankrupt," that is, any person, copartnership, or corporation adjudged to be bankrupt, may offer a composition.<sup>26</sup> This seems to have been so under the former law, though the word then was "person."<sup>27</sup>

22. In re Reiman, Fed. Cas. 11,673; In re Chamberlain, Fed. Cas. 2,580.

23. Hanover Nat. Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1.

24. See U. S. v. Fisher, 2 Cranch, 359, 396; McCulloch v. Maryland, 4 Wheat. 316, 321.

25. In re Shields, Fed. Cas. 12,784; In re Rider, 3 Am. B. R. 178, 96 Fed. 808; In re Frear, 10 Am. B. R. 199, 120 Fed. 978.

26. Compare § 1 (4) with § 1 (19). And see §§ 4 and 5.

27. In re Weber Furniture Co., Fed. Cas. 17,330; affirmed on appeal,

*Practice.*—This is detailed in subsequent paragraphs. The law is not as instructive on this point as was the Act of 1874. Nor are the General Orders exactly illuminating,<sup>28</sup> or the Forms prescribed by the Supreme Court reliable.<sup>29</sup> Supplementary forms will, however, be found among the "Supplementary Forms," *post*.

## II. Subs. a, b, c. OFFERING COMPOSITION.

**When, as to Time.**—A bankrupt may not *offer* terms of composition, until (1) his schedules have been filed,<sup>30</sup> and (2) he has been examined in open court or at a meeting of his creditors. It is conceivable that such an examination could be held before adjudication on proper notice, and, therefore, that, strictly, the offer can be made before adjudication; the debtor is then a bankrupt under the definition of § 1 (4), even though actually not so adjudged. As a practical matter, however, the offer is never made until at or after the first meeting of creditors. The other time limitation is indicated by this definition just mentioned. No offer can be made after a discharge; the person offering is no longer a bankrupt.

*At the First Meeting of Creditors.*—It seems that the offer can be made at the first meeting of creditors,<sup>31</sup> and that it may even be oral; provided there has been an examination of the bankrupt begun at such meeting. But where there has been a reference, the offer and its acceptance should, in the first instance, be filed with the referee. It would seem also that such acceptance by the required number of creditors can be tendered immediately after the offer. This was not so under the former law. A special meeting of creditors, on not less than ten days' notice, was required whenever the bankrupt proposed a composition.

**When, as to Acceptance by Creditors.**—But, though the offer may be made, application for its confirmation cannot be made until after the offer has been accepted in writing by a majority in number of all creditors whose claims have been allowed representing a majority in amount. Claims can be allowed only in the way prescribed by the law.<sup>32</sup> It results, therefore, that, before appli-

s. c., Fed. Cas. 17,331; Pool v. McDonald, Fed. Cas. 11,268.

28. General Orders XII (3), XXXII.

29. Forms Nos. 60, 61, 62, 63.

30. See § 7 (8).

31. In re Hilborn, 4 Am. B. R. 741, 104 Fed. 866.

32. Compare § 55-b, with § 57-d.



**Suba a, b, c.] Acceptance; Who May Accept; How Many Must.**

cation can be made for confirmation, an adjudication must be had, else there can be no allowed claims. Thus, is accomplished the first wide gap between the former and the present law.

*Acceptance, When and How Obtained.*—There is no statutory limitation here, and it is thought the consents of creditors can be obtained at any time after the petition for bankruptcy is filed, and, within the usual limitations as to *laches*, even after the year for the proving of claims has expired.<sup>33</sup> They could even be obtained at the first meeting, provided a majority in number and amount were present. Any paper containing an unqualified acceptance of the bankrupt's offer and signed by the creditor or a proxy duly authorized to that end, will comply with the statute. The usual method is to send printed forms of acceptance to the creditors. But there must be no improper influences or false representations used to secure signatures, lest the composition be refused confirmation on that ground.<sup>34</sup> A creditor who has once accepted cannot, in the absence of fraud or misrepresentation, withdraw his acceptance.<sup>35</sup>

*Who May Accept.*—Only creditors who would be entitled to vote for a trustee can be counted.<sup>36</sup> Priority claims are "allowed" like other claims, but, as the cash to pay them in full must be deposited as a condition precedent, the injustice of counting such claims is apparent. Secured claims will be counted only to the amount unsecured; they can be "allowed" only to such an amount.<sup>37</sup> Mortgagees whose debts are dependent solely upon the contingency of a deficiency arising upon foreclosure are neither necessary or proper parties to a proposed composition.<sup>37a</sup>

*How Many Must Accept.*—Here the present statute is widely different from its predecessor. A majority only of claims allowed, constituting a majority in amount of such claims, is sufficient for the consent required by this subsection; and the assignee of a large number of creditors will be counted as one creditor only.<sup>38</sup> But a bankrupt will not be permitted to select a time when but few creditors have proved and then present his terms only to creditors friendly to his interests. Indeed, it has been thought that

33. § 57-n.

34. See "Because of Absence of Good Faith" under this Section, post.

35. In re Levy, 6 Am. B. R. 299, 110 Fed. 744.

36. See § 56-a.

37. Note In re Spades, ante; In re

Scott, Fed. Cas. 12,519; In re O'Neil, Fed. Cas. 10,528; In re Van Auker, Fed. Cas. 16,828.

37a. Matter of Kahn, 9 Am. B. R. 107, 121 Fed. 412.

38. In re Messengill, 7 Am. B. R. 669, 113 Fed. 366.

the phrasing of Form No. 60 implies that a court of bankruptcy should notify creditors of a meeting at which it is proposed to offer a composition; and such a practice in cases where but a small number of creditors or creditors apparently controlled by the bankrupt have proven, should usually be followed.<sup>39</sup>

**When, as to Deposit of Consideration.**—Not only must there be a requisite acceptance, but the consideration of the composition must have been deposited in such place as shall be designated by and subject to the order of the judge. That this has been done will, if the acceptance is filed in the first instance with the referee, usually be shown by a certificate from the clerk. Whatever the nature of the consideration, it should in value be substantially as much as the property can reasonably be expected to yield to the creditors.<sup>40</sup>

*Nature and Amount of Consideration.*—Under the former law, where money was required to be deposited, it was frequently held that notes or other evidences of indebtedness could be deposited in lieu of money.<sup>41</sup> Whether this can be done under the present law was doubted by a previous editor of this work.<sup>42</sup> However, the setting-off of the word "consideration," as applied to common creditors, against the word "money," as applied to priority creditors, is significant; and the word "paid" but little affects the result. It is not doubted, therefore, that any consideration which would have been sufficient under the former law will be under this.<sup>43</sup> Such a conclusion is also in line with the tendency to permit compositions that are in effect but extensions of time, so well recognized already in the laws of the continental nations. The amount deposited must be enough to pay all creditors the stipulated percentage.<sup>44</sup>

39. Compare *In re Rider*, 3 Am. B. R. 178, 96 Fed. 808, with *In re Hilborn*, 4 Am. B. R. 741, 104 Fed. 866.

40. It was, however, held under the former law that, since assets in the hands of the failing debtor were worth more than in the hands of assignees, the existence of a reasonable margin which could be saved by the debtor through composition proceedings was immaterial. *In re Weber Furniture Co.*, Fed. Cas. 17,330 and 17,331; *In re Whipple*, Fed. Cas. 17,513.

41. *In re Reiman*, Fed. Cas. 11,673 and 11,675; *In re McNab*, Fed. Cas. 8,906; *In re Hurst*, Fed. Cas. 6,925.

42. Compare, however, careful review of this and kindred branches of the law of compositions in the opinion of Mr. Referee Judson, in *In re Rider*, 1 N. B. N. 483. In the case of *In re Frear*, 10 Am. B. R. 199, 120 Fed. 978, Judge Ray (N. D. N. Y.), refused to confirm a composition where promises to pay money or merchandise at a future day had been substituted for money.

43. See also § 14-c, which exempts from the effect of the discharge, following the confirmation of a composition "those agreed to be paid by the terms of the composition."

44. *In re Fox*, 6 Am. B. R. 525.

Subs. a, b, c.]

Deposit in Cash; of Assets.

*When Deposit in Cash is Necessary.*—Clearly, sufficient cash “to pay all debts which have priority and the cost of the proceedings” must be deposited. This was not so under the former law, if there were no appreciable assets.<sup>45</sup> There can be no doubt, however, that in all cases now this cash deposit must be made. How the “cost of the proceeding” is to be ascertained in advance is a bit puzzling. It includes the referee’s, and, since the amendatory act of 1903, the trustee’s commission, and the allowances to the attorneys for the bankrupt at least, and may include receivers’ and appraisers’ fees, and allowances to the attorneys for petitioning creditors. The only safe practice would seem to be to deposit such a sum as will be certainly larger than the total of all possible expenses, allowances, and fees.<sup>45a</sup>

*Can the Assets of the Estate be Deposited?*—This question does not seem to have been authoritatively decided under the former law.<sup>46</sup> Under the present law, title will have passed from the bankrupt ere he can offer composition; it may even have vested in a trustee. Thus, where there has been a sale of perishable property by an assignee, which is ratified by the trustee and the avails turned over to him. The difficulty is, however, more theoretical than existent, for the offer of composition could provide for notes payable on a day certain, and on that day, the composition having been meanwhile confirmed, the court could order the notes surrendered to the bankrupt in exchange for cash in the hands of the trustee, and that the latter be disbursed in place of notes. Section 12-e has been thought an insuperable obstacle to this practice; but, it is suggested that a court of bankruptcy will not dismiss the proceeding until its work is done, and that, therefore, the express provisions of the former law, requiring the enforcement of the composition by the court, by implication at least, still survive.<sup>47</sup> The opposite view would, in the nature of things, make compositions impossible, save through a loan on the security of property to which the bankrupt has not title. In effect, it would render a beneficent and wise system of arrangement between the debtor and his creditors but an exasperating illusion. It can

45. In re Chamberlain, Fed. Cas. 2,580.

45a. In re Harris, 9 Am. B. R. 20, 117 Fed. 575.

46. Boese v. Locke, 53 How. Pr.

(N. Y.) 148, and Goodrich v. Lincoln, 93 Ill. 359, have been deemed somewhat in point.

47. See In re Fox, ante.

safely be asserted, then, that, even under the present law, the assets of the bankrupt, even after the same are vested in the trustee, can be used by him, if not by direct deposit, at least by indirection, to accomplish a composition.<sup>47a</sup>

**Informal Compositions.**—In this connection, a practice sometimes attempted should be condemned. A bankrupt's estate can be wound up in but two ways, (1) by distribution in bankruptcy, or (2) by distribution in composition. The effort is sometimes made to start a proceeding in bankruptcy and then settle with creditors outside the proceeding; either letting the latter die of inanition or else asking for a sale of the assets at a nominal figure to him who furnishes the consideration for the informal settlement. The difficulties attending such an effort are indicated in *In re Lockwood*.<sup>48</sup> It can never be entirely successful until every creditor has accepted the settlement offered. As an attempt to evade the law, fruitful in possibilities of wrong to creditors who may not have notice, it will usually be checked when brought to the attention of the court. Nothing short of positive proof that every creditor has been ascertained and, without exception, paid the same *pro rata*, will warrant an order for the sale of the assets, even to him who comes into court claiming to be subrogated to the rights of the creditors; indeed, it may be doubted whether the court, thus informed of an attempted evasion of the law, will set the machinery of that law in motion for the benefit of him who admits such an attempt.

**Practice.**—Much that has gone before indicates the steps in composition proceedings up to the application for confirmation.

*"Examined."*—This does not necessarily mean that the examination must be completed, but that there must have been a sufficient examination. If creditors so desire, the judge or referee will, in proper cases, adjourn the meeting to permit an extended examination, before allowing the offer to be made. If there is no meeting pending, and there has been no previous examination, one must be called for the purpose of the examination, and the regular procedure to that end must be observed.<sup>49</sup>

*Ascertaining Whether a Majority has Consented.*—This seems to be the duty of the referee, where the case has been referred. Only

<sup>47a</sup>. But see, as tending to disapprove of the statement in the text, *In re Frear*, 10 Am. B. R. 199, 120 Fed. 978.

<sup>48</sup>. 4 Am. B. R. 731, 104 Fed. 794.

<sup>49</sup>. For instance, notice must be given, see § 58-a (1).

Subs. c, d.]

Confirming or Rejecting Composition.

those creditors may accept a composition who could vote for trustee. This excludes, besides priority creditors and secured creditors to the amount of their securities,<sup>50</sup> preferred creditors also, for the reason that their claims, if presented, will not be allowed unless accompanied by a surrender.<sup>51</sup>

*Reporting to the Judge.*—Only the judge has power to confirm a composition. If the offer and acceptance are made after reference, the referee will arrest the proceedings and report the proposed composition to the judge. This may be done by handing up a transcript of his record-book, showing (1) the filing of the debtor's schedules, (2) his examination, (3) his offer, (4) its acceptance by the required majority in number and amount of claims allowed, and (5) the consideration to be deposited, and (6) a list of creditors and their addresses, the referee meanwhile, however, keeping the meeting of creditors alive by repeated continuances, so as to permit a prompt resumption of administration in case the proposed composition is not confirmed. If it is, the referee has no other duty, save, subsequently, to report the case closed. The proper practice is detailed in the "Supplementary Forms," *post*.

### III. Subs. c, d. CONFIRMING OR REJECTING COMPOSITION.

**Practice.**—The practice, from the time the referee's report reaches the judge, is identical with that on contested applications for discharge,<sup>52</sup> except, perhaps, as modified by subsection c. "Parties in interest" is a broader term than "creditors." The same phrase is used in § 14-b. It is difficult to suppose a case when it will include others than those persons who have proved or may prove their claims. Ordinarily, after the time to enter appearances has expired, and there are none and no objections, there is a reference in any event to the referee in charge, as special master,<sup>53</sup> it being the duty of the court to satisfy itself affirmatively as to the three facts set out in subsection d; in this, the practice differs from that on discharges. When objections are filed, there must be a hearing, and the same reference to a special master is customary. The date and place fixed for the hearing must be

50. See p. 141, ante. And compare *In re Scott*, Fed. Cas. 12,519.

51. §§ 57-g and 60-b.

52. See under Section Fourteen of this work.

53. Note General Orders XII (3) and XXXII and § 38-a (4).

convenient, but the former is usually set after conference with the respective attorneys.

**Objections to Confirmation.**—The objection that the composition is not offered in accordance with the law (as where it is asserted that a majority in number and amount has not consented), which was a statutory objection under the former law, should probably now be taken specially; and, in that event, opportunity to correct the error will probably be given. It seems that the only grounds which can be alleged in the formal written objections are those stated in subsection d.<sup>54</sup> The burden is, of course, on the objector.<sup>55</sup> There must be a positive showing to rebut the presumption that the action of the majority is for the interest of all.<sup>56</sup>

*Because Against the Best Interests of the Creditors.*—This was an objection under the former law and useful precedents will be found in the reported cases. The English rule seems to be that, unless fraud is shown, the decision of the creditors will be final.<sup>57</sup> That this is not the rule in this country is emphasized by the requirement of the present statute that the judge must be "satisfied." The point usually made is that the offer is less than would be realized on a sale of the assets in bankruptcy. A gross discrepancy will constrain a refusal to confirm,<sup>58</sup> but not a slight difference.<sup>59</sup> A *bona fide* offer of a larger sum for the assets than the bankrupt, through the composition, is willing to pay, would seem sufficient to warrant a rejection of the composition. In the nature of things, each case must turn on its own facts.

*Because of Commission of Acts or Failure to Perform Duties which would Bar a Discharge.*—This objection was not available under the former law. It is, however, both reasonable and proper, since the confirmation of a composition is, in effect, a discharge. The intention clearly is to prevent one who cannot get a discharge from securing its equivalent through a composition. For avail-

54. In re Rudwick, 2 Am. B. R. 114, 93 Fed. 787. Jewett, Fed. Cas. 7,303; In re Morris, Fed. Cas. 9,824.

55. City Nat. Bank v. Doolittle, 5 Am. B. R. 736, 107 Fed. 236. 58. In re Whipple, Fed. Cas. 17,513; Ex parte Williams, 10 L. R., Eq. C. 55.

56. In re Weber Furniture Co., Fed. Cas. 17,330 and 17,331; In re Greenbaum, Fed. Cas. 5,769. 59. Thus in In re Arrington Co., 8 Am. B. R. 64, 113 Fed. 498, and in In re Criterion Watch, etc., Co., 8 Am. B. R. 206. See also cases under law of 1867, ante.

57. Adler v. Jones, 6 Am. B. R. 245, 109 Fed. 967. See Ex parte

## Subs. c, d.]

## Effect of Fraud.

able objections to a discharge, see under Sections Fourteen and Twenty-nine of this work.<sup>60</sup> If a bankrupt has committed an offense available as an objection to his discharge the court will refuse to confirm the proposed composition without regard to the interests of the creditors, and the fact that but one creditor objects is of no importance.<sup>60a</sup> The new objections to discharges<sup>61</sup> will make this subsection more valuable. It is thought that the provision that a petition for a discharge cannot be filed after a year after the adjudication does not apply to compositions. A composition has primarily to do with administration, and that may, from one cause or another, be delayed for years.

*Because of Absence of Good Faith.*—Fraud is sufficient to warrant a refusal to confirm,<sup>62</sup> but it must be fraud connected with the offer or acceptance of the composition. Cases cited under the succeeding Section will also be found in point. Fraud on the part of a single creditor is sufficient,<sup>63</sup> as where a creditor proves a false claim.<sup>64</sup> The giving of money to induce a creditor to sign vitiates the composition,<sup>65</sup> and, if it is extorted by the creditor, is a crime also.<sup>66</sup> Any secret advantage given one creditor over his fellows accomplishes the same result.<sup>67</sup> Purchasing claims for the purpose of using them to accomplish a composition is not necessarily fraudulent, but will be so held unless an honest motive appears.<sup>68</sup> Improperly inducing a creditor to withdraw has the same effect as improperly persuading him to join in the composition. The good faith of both debtor and creditors must be of the highest order.

**Effect of Fraud on a Composition Already Confirmed.**—Not only may the composition be objected to, but, if obtained by fraud, it is void and unenforceable, and the consideration may be recovered back.<sup>69</sup> It would seem, however,—a certified copy of the order confirming a composition being evidence of the jurisdiction of the court, the regularity of the proceedings and the fact that the order

60. In re Wilson, 5 Am. B. R. 849, 107 Fed. 83.

60a. In re Godwin, 10 Am. B. R. 252, 122 Fed. 111.

61. § 14-b (3) (4) (5) (6).

62. § 13.

63. In re Sawyer, Fed. Cas. 12,395; In re Whiting, Fed. Cas. 17,580.

64. Compare § 29-b (3).

65. In re Sawyer, supra.

66. § 29-b (5).

67. In re Jacobs, Fed. Cas. 7,159; Bean v. Amsinck, Fed. Cas. 1,167, on appeal, s. c., Bean v. Amsinck, 10 Blatchf. 361; Bean v. Brookmire, Fed. Cas. 1,170.

68. In re Sawyer, supra.

69. Bean v. Amsinck, supra. See also Section Thirteen of this work.

was made,<sup>70</sup> — that a composition if attacked for fraud must be so attacked in a court of bankruptcy.

#### IV. Subs. e. DISTRIBUTION IN COMPOSITION.

**Practice.**—The law is silent as to practice on distribution. The consideration has been deposited “in such place as shall be designated by the judge.”<sup>71</sup> It can only be distributed “by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge.”<sup>72</sup> But the distribution may be made “as the judge shall direct.” Form No. 63 seems to imply that it shall be made by the clerk, and this practice, amplified by district rules, has been generally adopted. At the same time, a convenient method is to make the referee in charge a distributing agent to the extent of performing the clerical work required;<sup>73</sup> the checks, however, to be signed by the clerk. Otherwise, the referee should furnish the clerk with a list of claims allowed, specifying the names, amounts, addresses, and the like.<sup>74</sup> As to the proof of claims the course of proceeding is the same whether there be composition, or the proceedings are carried through in ordinary course. Claims not proved within one year from the date of adjudication are not to share in the composition funds,<sup>75</sup> and the bankrupt may be heard to object to the allowance in composition of a claim offered for proof after the expiration of such year.<sup>76</sup> The judge having ample power to pass on claims, proofs filed after a composition has been accepted should be forwarded to the clerk. It seems that none of the officers named in the act can collect additional fees for making the distribution, their fees being limited by both it and the general orders. Now that the trustee may receive an allowance in composition cases,<sup>77</sup> such officer, if appointed, may properly be called upon to distribute the consideration.

<sup>70</sup>. § 21-f.

<sup>71</sup>. Subs. b.

<sup>72</sup>. General Order XXIX.

<sup>73</sup>. Compare *In re Hamlin*, Fed. Cas. 5994.

<sup>74</sup>. Perhaps this is his duty under General Order XXIV, though that rule being merely an inheritance from the rules in force under the

former law, it is quite generally ignored.

<sup>75</sup>. *In re Brown*, 10 Am. B. R. 588, 123 Fed. 336, see § 57, cl. n., post.

<sup>76</sup>. *In re Lane*, 11 Am. B. R. 136, 125 Fed. 772.

<sup>77</sup>. See § 48-a, as amended by the Act of 1903.



Sub. e.]

Dismissal; Confirmation; Appeals.

**Dismissal of the Case.**— Not until the distribution is completed, should the case be dismissed. If scheduled debts remain unproved or claimants cannot be found, the case proceeds to final distribution as in cases of unclaimed dividends.<sup>78</sup> But not until the consideration is entirely distributed by a transfer of the remaining funds into a new fund for distribution as unclaimed dividends, will the case be dismissed. A formal order to this effect should be entered, and the referee notified, that he may file the case as closed. It is not thought that the requirement of § 58-a (8) makes a notice to creditors of a proposed dismissal of this kind necessary.

**Confirmation and Its Effect.**— If the judge refuses to confirm the composition, the bankruptcy proceeding *per se* is revived and must be proceeded with as if no offer of composition had been made. If it is confirmed, a formal order is entered to that effect.<sup>79</sup> This order and that dismissing the case are not the same. The title to the bankrupt's property immediately vests in him.<sup>80</sup> A certified copy of the order, when recorded, act as a deed.<sup>81</sup> The order of confirmation becomes in effect a discharge and may be pleaded in bar with like effect.<sup>82</sup> But it does not affect his obligation created as a part of the composition;<sup>83</sup> and, if notes given as the consideration are not paid, they are payable in their original amount.<sup>84</sup> The effect of a composition or discharge on the liability of a codebtor is discussed elsewhere.<sup>85</sup> But, like a discharge, a composition, if not pleaded, is deemed waived.<sup>86</sup>

**Appeals.**— Whether there may be an appeal from the order of a judge confirming or refusing to confirm a composition has already been somewhat debated. The word "satisfied" suggests a discretion from which no appeal will lie; the words of § 25-a emphasize

78. See § 66. Compare *In re Hinsdale*, Fed. Cas. 6,526.

79. Form No. 62.

80. § 70-f; *In re August*, Fed. Cas. 645; *In re Shaw*, Fed. Cas. 12,716; *In re Rodger*, Fed. Cas. 11,992; *In re Winship Co.*, 9 Am. B. R. 638, 120 Fed. 93, 56 C. C. A. 45.

81. § 21-g.

82. *Glover Grocery Co. v. Dorne*, 8 Am. B. R. 702. See also *In re Merriman*, Fed. Cas. 9,479; *In re Becket*, Fed. Cas. 1,210. For its effect on a claim for deficiency by a

record creditor, see *In re Stowell*, 24 Fed. 468; *Paret v. Ticknor*, Fed. Cas. 10,711.

83. § 14-c. See also generally as to debts not affected, under Section Seventeen of this work.

84. *In re Reiman*, Fed. Cas. 11,673 and 11,675; *In re Hurst*, Fed. Cas. 6,925; *In re Negley*, 20 Fed. 499.

85. See Section Sixteen.

86. *In re Tooker*, Fed. Cas. 14,096; *Dimock v. Revere Copper Co.*, 117 U. S. 559.

this impression. That an appeal will not lie has been held,<sup>87</sup> though that ruling was reversed by the Circuit Court of Appeals of the Sixth Circuit.<sup>88</sup> The latter decision has already been departed from in the First Circuit,<sup>89</sup> indeed, it may be suggested that it loses sight of the fundamental difference between a discharge<sup>90</sup> and a composition, which, strictly, is a branch of administration, and, for convenience only, has the effect of a discharge. Even if confirmation is refused, the bankrupt is not aggrieved, for his rights were exercised when he made the offer, and he may still apply for a discharge in the bankruptcy proceeding. He, at least, should not be heard on the appeal. If he cannot, creditors surely cannot, as not within the words or intendment of § 25-a. The question is, however, still an open one. It has been held that the creditors assenting to a composition, and who have received the amount due them thereunder, are necessary parties to an appeal from the order of confirmation.<sup>91</sup>

87. *In re Adler*, 4 Am. B. R. 583, 103 Fed. 444.

88. *U. S. v. Adler*, 4 Am. B. R. 736, 104 Fed. 862. See also *Adler v. Jones*, 6 Am. B. R. 245, 109 Fed. 967.

89. *Ross v. Saunders*, 5 Am. B. R. 350, 105 Fed. 915.

90. A discharge proper may be appealed from. See § 25-a (2).

91. *Field & Co. v. Wolf & Bro. Dry Goods Co.*, 9 Am. B. R. 693, 120 Fed. 815, 57 C. C. A. 326.

## SECTION THIRTEEN.

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### COMPOSITIONS, WHEN SET ASIDE.

§ 13. **Compositions, when Set Aside.**— *a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

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**Analogous provisions:** In U. S.: R. S., § 5103A (Act of June 22, 1874).

In Eng.: Act of 1890, § 3 (15).

**Cross references:** To the law: §§ 2 (9); 12; 15; 21-f; 44; 64-c; 70-d.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Law.

**Fraud, the Only Ground.**

*What is Fraud?*

**Effect of Setting Aside.**

#### II. Practice.

**Petition.**

**Notice.**

**Trial.**

**Impeaching the Order Setting Aside.**

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#### I. LAW.

**Fraud, the Only Ground.**— The striking similarity between this section and § 16 should be noted at the outset.<sup>1</sup> The marked differ-

1. For what degree and kind of fraud will sustain a proceeding to set aside a discharge or a composi-

ence between it and the corresponding clauses of the former law will also be observed. Then, a composition could be set aside, if it appeared that, in consequence of legal difficulties, or for any sufficient cause, it could not proceed without injustice or undue delay. This, with the added objection that "the approval of the court was obtained by fraud," is the law in England to-day.<sup>2</sup> This added objection stands alone in our present law. Those available under the law of 1867 have been discarded. Most of the cases under that law are thus of little value.<sup>3</sup>

*What is Fraud.*—This subject has been discussed under section Twelve, *ante*.<sup>4</sup> Such fraud as would warrant the refusal of confirmation to a composition will warrant its setting aside, with this difference; the fraud must have been discovered since the confirmation of the composition.<sup>4a</sup> It must, of course, have been practiced in the procuring of the composition. In this respect § 13 is clearly a limitation on § 2 (9).<sup>5</sup> Only when a fraud, as thus restricted, appears and is proven, can the jurisdiction to set aside a composition and reinstate the case be exercised.<sup>6</sup> The making of a false schedule, and a false oath to a schedule, and the concealment of property by the bankrupt constitute fraud "practiced in the procuring of such composition."<sup>6a</sup>

**Effect of Setting Aside.**—It, of course, revests the title in the trustee; but, it does more. It takes from the debtor all property acquired since the adjudication and applies it in payment of debts contracted while the composition was in force.<sup>7</sup> This is the only approximation in our statute to the English doctrine that results in drawing in all property acquired after the receiving order and before the discharge. The rule, too, is eminently just. As to payments made under the composition, it seems that they are not

2. Act of 1890, § 3 (15).

3. For instance, *In re Dupee*, Fed. Cas. 4,183, has already been declared inapplicable in *In re Rudwick*, 2 Am. B. R. 114, 93 Fed. 787, though this ruling may be doubted. Compare *In re Dietz*, 3 Am. B. R. 316, 97 Fed. 563.

4. See p. 147, *ante*. See also *Elfelt v. Snow*, Fed. Cas. 4,342; *In re Sturges*, Fed. Cas. 13,565.

4a. *In re Roukous*, 12 Am. B. R. 128, 128 Fed. 645.

5. *In re Rudwick*, *supra*.

6. Cases under the former law are *Fairbanks v. Amoskeag Bank*, 38 Fed. 630; *Pool v. McDonald*, Fed. Cas. 11,268; *In re Shaw*, 9 Fed. 495.

6a. *In re Roukous*, 12 Am. B. R. 128, 128 Fed. 645.

7. § 64-c.

affected.<sup>8</sup> The order setting aside also reinstates the case, and provision is made elsewhere in the statute for the election of a trustee in such cases.<sup>9</sup> A trustee once elected, the case proceeds as though there had been no composition, and every one is restored, so far as possible, to the rights and remedies existent at the time the composition was confirmed.

## II. PRACTICE.

**Petition.**— This must be (1) made by a “party in interest,”<sup>10</sup> (2) to the judge, and (3) filed within six months after the composition has been confirmed. In the absence of rules of practice, the procedure followed when application is made to revoke a discharge, perhaps, even the practice on application for a discharge, may be adopted.<sup>11</sup> The petition should show (1) that the petitioner is a party in interest, (2) that the composition was confirmed not more than six months before, (3) that fraud was practiced in procuring it and the nature and perpetrators of such fraud, and (4) that such fraud was not discovered by the petitioner until after the confirmation of the composition.<sup>11a</sup> The judge only has power to hear the application, not, however, because of the limitation on analogous proceedings found in § 38-a (4), but because only “the judge \* \* \* may set \* \* \* aside a composition.”

**Notice.**— Notice should be given to all creditors,<sup>12</sup> they, and not the bankrupt, being the real parties in interest; but not necessarily the notice required by § 58-a. The former law prescribed the practice on notice. It is thought that an order to show cause, similar to that used on an application for discharge, will be sufficient. But the judge can change the form or method of service, and make it returnable when or where he wishes; but, from the analogy of other sections, both time and place should, however, be convenient for the parties in interest.

8. Ex parte Hamlin, Fed. Cas. 5,994. See *In re Roukous*, 12 Am. B. R. 128, 128 Fed. 645, citing text.

9. § 44.

10. Equivalent to “creditors,” though often meaning more. But compare *In re Scott*, Fed. Cas. 12,519.

11. See under Sections Fourteen and Fifteen, post.

11a. See *In re Roukous*, 12 Am. B. R. 128, 128 Fed. 645.

12. Ex parte Hamlin, ante; *In re Diggles*, Fed. Cas. 3,905; *In re Dunn et al.*, 53 Fed. 341.

**Trial.**— It has been thought that the word “trial” makes a jury necessary. Not only is the proceeding a purely equitable remedy, but, elsewhere in the statute, the same word is used in such ways as to negative, in connection with the clear meaning of § 566 of the Revised Statutes as limited by § 19 of the law, such a view. The hearing required in §§ 12 and 14 is, therefore, no different from the trial made mandatory by §§ 13 and 15. In actual practice, these trials will usually be before the referee sitting as a special master.

**Impeaching the Order Setting Aside.**— This cannot be done collaterally. A certified copy is evidence of jurisdiction, regularity, and that the order was made.<sup>13</sup>

13. § 21-f.

## SECTION FOURTEEN.

### DISCHARGES, WHEN GRANTED.

§ 14. Discharges, when Granted.— *a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

*b* The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with<sup>1</sup> intent to conceal his<sup>2</sup> financial condition,<sup>3</sup> destroyed, concealed, or failed to keep books of account or records from which *such*<sup>4</sup> condition might be ascertained; or (3) *obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit; or (4) at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors; or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years; or (6) in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court.\**

1. Here the word "fraudulent" was stricken out by the amendatory act of 1903.

2. Here the word "true" was stricken out by the same.

3. Here the words "and in contemplation of bankruptcy" were stricken out by the same.

4. Here the word "such" takes the place of the words "his true" in the original act.

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\*Amendments of 1903 in italics.

c The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

**Analogous provisions:** In U. S.: *As to the application and hearing*, Act of 1867, § 29, R. S., §§ 5108 (as amended by Act of July 26, 1876), 5109; Act of 1841, § 4; *As to objections to discharge*, Act of 1867, §§ 29, 30, 33, R. S., §§ 5110, 5112, 5112A (added by the Act of June 22, 1874), 5116; Act of 1841, § 4; Act of 1800, §§ 36, 37; *As to proofs and pleadings*, Act of 1867, § 21, R. S., § 5111; Act of 1841, § 4; *As to oaths and verification*, Act of 1867, § 29, R. S., § 5113; *As to proceedings, certificate of discharge and second applications*, Act of 1867, §§ 30, 32, R. S., §§ 5114, 5115, 5116; Act of 1841, § 12; Act of 1800, § 57.

**In Eng.:** *As to application, hearing, objections, and procedure*, Act of 1890, § 8 (1)-(8).

**Cross references:** **To the law:** §§ 2 (12); 3-a (1); 7-a (9); 11-a; 12; 15; 17; 29-b; 38-a (4); 63-a; 70-a-d.

**To the General Orders:** XII (3), XXXI, XXXII.

**To the Forms:** Nos. 57, 58, 59.

## SYNOPSIS OF SECTION.

### I. History and Comparative Legislation.

Discharges under Other Systems.

*The Origin of the Discharge.*

Discharges in the United States.

The Present Statute and the Amendments of 1903.

### II. Subs. a. Application for and Hearing on Discharge.

Application.

*Practice.*

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*Minutes and Report.*

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*Costs.*

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**III. Subs. b. Objections to a Discharge.****Must Fall Within Statutory Grounds.***Under the Original Law, and under the Law as Amended.***Subd. (1). The Commission of an Offense Punishable by Imprisonment under the Bankruptcy Law.***Concealment of Property.**Continuing Concealment.**Miscellaneous Cases.***A False Oath in the Proceeding.***Use of Former Examination under § 7 (9).**Illustrative Cases.***Subd. (2). Failure to Keep, Destruction, or Concealment of Books.***Elements of Proof.**Illustrative Cases.***Subd. (3). Obtaining Property on Credit on a False Written Statement of Financial Condition.***Elements of Proof.**Meaning of Clause.*(1) *Obtaining property on credit.*(2) *A statement of financial condition.*(3) *In writing.*(4) *Materially false.*(5) *For the purpose of obtaining such property from the creditor.*(6) *By the bankrupt.**When this Clause Went into Effect.***Subd. (4). Made a Fraudulent Transfer.***Elements of Proof.**Are General Assignments Objections to Discharges?***Subd. (5). Been Granted a Previous Discharge in a Voluntary Bankruptcy within Six Years.***When this Clause Went into Effect***Subd. (6). Refusal to Obey a Lawful Order, or to Answer a Material Question Approved by the Court.***Refusal to Obey.**Refusal to Answer.**When this Clause Went into Effect.***IV. Subs. c. Effect of Composition.***On Debts Old and New.***V. Effect of Discharge.***In General.**On Liens.**Discharge Must be Plead.*

## I. HISTORY AND COMPARATIVE LEGISLATION.

**Discharges under Other Systems.**—Republican Rome punished the bankrupt with slavery, and, it is said, in some cases, even permitted the creditors to pro-rate the debtor's body, as well as his estate; Rome under the Emperors, however, granted a discharge to the honest insolvent. The savagery of the early Latins, though much softened, still survives in the continental bankruptcy systems of to-day. Thus, in France, not only must a bankrupt in effect pay his debts in full, but there are three classes of bankrupts: (1) those whose condition is due to misfortune, and who are, therefore, not liable to imprisonment; (2) those who have been guilty of misconduct not tantamount to an actual fraud, who may be imprisoned from one month to two years; and (3) those whose bankruptcy is fraudulent, who may be sentenced to penal servitude for not less than five nor more than twenty years. These restraints on the liberty of the dishonest trader are characteristic of all European laws. They are a survival of the time when inability to pay a debt was a crime. England stands about midway between these systems and our own. Fraudulent bankruptcy is a crime,<sup>5</sup> but, except as against certain well-defined statutory objections, a discharge may generally be obtained whatever be the rate per cent. paid.<sup>6</sup>

5. See Debtors Act of 1869, Part II.

6. Since the Act of 1890 in England, the court has, on proof of certain facts like our objections to a discharge, four options, (1) to refuse the discharge absolutely, (2) to suspend it for not less than two years, (3) to suspend it until a dividend of not less than 50 per cent. has been paid, or (4) to require the bankrupt to permit entry of judgment for the balance unpaid, execution, however, not to issue thereon without leave of court. Act of 1890, § 8(2).

The facts, or objections to discharge as we would call them, are (1) that, save in cases of misfortune not amounting to misconduct, the assets do not amount to ten shillings in the pound, or (2) the bankrupt's omission to keep proper books of account within three years, or (3) continuance in trade after knowing himself to be insolvent, or (4) the contracting of a

debt without at the time having reasonable ground or expectation of ability to pay it, or (5) the failure to account satisfactorily for deficiency in assets, or (6) that the bankruptcy was brought on by rash speculation, extravagance in living, gambling or culpable neglect of business, or (7) his interposing any frivolous or vexatious defense to any action properly brought, or (8) within three months incurred unjustifiable expense in so doing, or (9) while insolvent and within three months gives an undue preference, or (10) within three months incurred liabilities for the purpose of making his assets equal to ten shillings in the pound, or (11) had a previous bankruptcy, composition or arrangement with creditors, or (12) been guilty of fraud or fraudulent breach of trust. (Act of 1890, §§ 8 (3) (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l).)

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 § 14.1 Origin of the Discharge; Discharges in the United States.
 

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*The Origin of the Discharge.*— We have grown to look upon the discharge feature as the primal element of bankruptcy jurisprudence. Being too easily obtained, it has resulted in abuse, and, therefore, reprobation. The fact is, however, that the discharge feature was not grafted on our Anglo-Saxon bankruptcy system until the fourth year of Anne, two hundred and fifty years after England's first bankruptcy law, and that, in its inception, it was a device to keep bankrupts in England.<sup>7</sup> Strictly speaking, it is no more a part of a bankruptcy law — which concerns itself with the equitable division of a debtor's assets — than are those sections which define bankruptcy crimes. It is unfortunate that our legislators and jurists have so long overlooked its origin. Else we would not to-day, from this point of view, seem a people given to financial jubilees.<sup>8</sup>

**Discharges in the United States.**— Each of our laws, save that of 1800, was the result of agitation in the interest of the hopeless insolvents of well-known periods of financial depression. Our first law required the consent of two-thirds in number and value of the creditors, and a discharge might be withheld for concealment of assets, fraud, losses in gambling, and the like.<sup>9</sup> Available objections under the law of 1841, among others of less importance, were fraud, concealment of assets, preference of creditors, willful omission or refusal to obey orders of the court, misappropriation of trust funds, or, if a merchant, failure to keep books of account; nor could a discharge be granted — subject, however, to a judicial inquiry as to its justness — where a majority in number and value of creditors filed a written dissent.<sup>10</sup> The law of 1867, modeled in this feature after the then English law, went further and denied a discharge to him who had willfully sworn falsely in the proceeding, or concealed assets, or been guilty of fraud or negligence as to his property, or destroyed or falsified his books, or secreted his assets with intent to defraud, or given a fraudulent preference, or made a fraudulent transfer, or lost property in gaming, or admitted or failed to disclose a fictitious debt, or, if a merchant, had not kept proper books, or procured the assent of a creditor by a pecuniary consideration, or in contemplation of bankruptcy made

7. See 4 Anne, chap. 17.

9. Act of 1800, §§ 36, 37.

8. Compare the Hebrew jubilee in Leviticus, Chap. XXV.

10. Act of 1841, § 4.

a preference, or been convicted of a crime under the act, or been guilty of any fraud contrary to the true intent of the law.<sup>11</sup> After the first year, and until 1874, the debtor was obliged to pay fifty cents on the dollar, unless he had the consent of a majority in number and value of creditors to take a less sum;<sup>12</sup> a restriction which, after 1874, was abolished in involuntary cases, and modified in voluntary cases to a required dividend of thirty per cent., save with the assent of one-fourth of the creditors in number and one-third in amount.<sup>13</sup> Nor, save by consent of creditors, was a bankrupt granted a second discharge, short of paying seventy cents on the dollar to all creditors.<sup>14</sup> There were undoubtedly frauds on creditors, followed by discharges, under that law, but, if so, it was not the fault of the law-making power.

**The Present Statute and the Amendments of 1903.**—It is conceded that the law of 1898 was woefully weak in its discharge features. The parent bill was not,<sup>15</sup> but, in the compromises that accompanied its passage, nearly all the objections to discharges, not amounting to bankruptcy crimes, disappeared. As the law was passed, a discharge could be refused only on a showing of (1) concealment of assets, (2) false swearing in the progress of the proceeding, and (3) destruction of, concealment of, or failure to keep, books of account, accompanied by fraudulent intent to conceal financial condition and a purpose of going into bankruptcy. Even these meager bars on dishonesty have been necessarily cut through by judicial constructions; and the country has witnessed the spectacle of a commercial jail delivery. This condition has, however, been met by the amendatory act of 1903, which has added four new objections to a discharge, discussed in detail later. It is already settled that restrictions on discharges do not make the law unconstitutional.<sup>16</sup> The proceedings are to be governed by the law as it existed at the time he filed his adjudication.<sup>16a</sup>

## II. Subs. a. APPLICATION FOR AND HEARING ON DISCHARGE.

**Application.**—At any time after one month, and not later than twelve months<sup>17</sup> subsequent to the adjudication, a bankrupt may

11. Act of 1867, § 29, R. S., § 5110. § 51; also the Henderson bill, § 13,  
12. Act of 1867, § 29, R. S., § 5112. p. 2039, Vol. 31, Cong. Record, 55th

13. Act of June 22, 1874, R. S., Congress, Second Session.  
§ 5112A. 16. Hanover Nat. Bank v. Moyses,

14. Act of 1867, § 30, R. S., § 5116. 186 U. S. 181, 8 Am. B. R. 1.

15. See Torrey bill, S. 1035, 55th Congress, 1st Session, introduced by  
Senator Lindsay, March 22, 1897, R. 95, 125 Fed. 629.

17. See § 31.

apply for a discharge. His time, on cause shown, may be and usually is extended six months, but such extension can be granted only by the judge.<sup>18</sup> In that event, that the bankrupt was unavoidably prevented from filing his application within the time should clearly appear; *laches* will be fatal.<sup>19</sup> The application will be dismissed if not diligently prosecuted.<sup>20</sup> Application for discharge may be filed by any bankrupt, even one refused a discharge in a former proceeding,<sup>21</sup> and, it is thought, by a corporation.<sup>22</sup> But a second petition cannot be filed where a first petition in the same bankruptcy was denied on the merits.<sup>23</sup>

*Practice.*—The application is made by a petition,<sup>24</sup> which should state “the proceedings in the case and the acts of the bankrupt,” and, even though verification is not required, may well be verified.<sup>25</sup> The elaborate oath prescribed by the law of 1867 is no longer necessary. If made by a member of a firm, the petition should indicate that the intention is to bar his partnership liability.<sup>26</sup> It should be filed with the clerk and be addressed to the judge; the referee, as referee, has no power to consider it.<sup>27</sup> The clerk thereupon issues an order to show cause to creditors, returnable before the judge. This order must be served by mail. In some districts, the practice outlined by the second part of Form No. 57 is literally followed. In others, local rules result in the referee giving the required notice by mailing and publishing the order to show cause, or a notice of its pendency, and then returning the proofs,

18. For petition, certificate of the referee in charge, and order, see “Supplementary Forms,” post.

19. In re Wolff, 4 Am. B. R. 74, 100 Fed. 430; In re Fahy, 8 Am. B. R. 354, 116 Fed. 239. Where such extension is granted, creditors are confined to statutory objections, In re Haynes & Son, 10 Am. B. R. 13, 122 Fed. 560.

20. In re Lederer, 10 Am. B. R. 492, 125 Fed. 96.

21. In re Herrman, 4 Am. B. R. 139, 102 Fed. 753; In re Clapp, 7 Am. B. R. 128, 111 Fed. 506.

22. In re Marshall Paper Co., 2 Am. B. R. 653, 95 Fed. 419; affirmed on appeal, s. c., 4 Am. B. R. 468, 102 Fed. 872.

23. In re Royal, 7 Am. B. R. 636, 113 Fed. 146; Matter of Feigenbaum,

9 Am. B. R. 595 (C. C. A.), 121 Fed. 69, reversing 7 Am. B. R. 339.

24. See General Order XXXI and Form No. 57.

25. Compare In re Brown, 7 Am. B. R. 252, 112 Fed. 49.

26. In re Laughlin, 3 Am. B. R. 1, 96 Fed. 589. See also In re Hale, 6 Am. B. R. 35, 107 Fed. 432; In re Carmichael, 2 Am. B. R. 815, 96 Fed. 594; In re Russell, 3 Am. B. R. 91, 97 Fed. 32; In re McFaun, 3 Am. B. R. 66, 96 Fed. 592. See for individual petition after refusal of discharge to partnership, In re Feigenbaum, *supra*. Compare for rule under law of 1867, In re Pierson, Fed. Cas. 11,153.

27. See § 38-a (4) and General Order XII (3).

with a certificate of conformity, to the clerk in time for the return day.<sup>28</sup> The practice is not uniform throughout the country; local rules or customs should always be ascertained. Everywhere, however, all creditors and persons in interest must have at least ten days' notice of the hearing.

**Procedure on the Hearing.**—On the call of the case on the return day, if no appearance is entered or appearance filed, and the statutory facts as to time, publication and mailing, etc., appear, a discharge follows.<sup>29</sup> The judge does not, as a rule, investigate further.<sup>30</sup> The failure to appear on the return day will ordinarily preclude a creditor from subsequently filing specifications of objections.<sup>30a</sup> An objection going to the jurisdiction cannot, it seems, be made for the first time on the application for the discharge.<sup>31</sup> If, however, an appearance is entered, the specifications of objection need not be filed until ten days thereafter,<sup>32</sup> and the time may be enlarged by the judge, or, in given circumstances, a late specification may be filed *nunc pro tunc*.<sup>33</sup> The hearing must then go on "at such time as will give parties in interest a reasonable opportunity to be fully heard." It must be before the judge or before a special master appointed for that purpose; a jury cannot be demanded.<sup>34</sup>

**Specifications of Objection.**—Form No. 58 is a hint at what the specifications should be like, but no more. They must be in writing and verified,<sup>34a</sup> and may be filed by any person having a pecuniary

28. This practice is recommended. For sample rules and forms, see Rules X and XI, No. Dist. of N. Y., 1 N. B. N. 109; and Forms S. & T. Erie County (N. Y.) Dist., 1 N. B. N. 123; also "Supplementary Forms," post. See also In re Sykes, 6 Am. B. R. 264, 106 Fed. 669.

29. See In re Marshall Paper Co., 4 Am. B. R. 468, 102 Fed. 872.

30. In re Royal, 7 Am. B. R. 636, 113 Fed. 140.

30a. In re Ginsburg, 12 Am. B. R. 459, 130 Fed. 627.

31. Allen & Co. v. Thompson, 10 Fed. 116; In re Ives, Fed. Cas. 7,115; In re Polakoff, 1 Am. B. R. 358.

32. General Order XXXII; In re Albrecht, 5 Am. B. R. 223, 104 Fed. 974.

33. In re Clothier, 6 Am. B. R.

203, 108 Fed. 199; In re Grefe, Fed. Cas. 5,794.

34. Compare § 19. A jury trial was possible under the former law.

34a. In re Glass, 9 Am. B. R. 391, 119 Fed. 509, holding that the verification should be by the oaths of the opposing creditors, in the form prescribed by Form No. 3, post. It was further held in this case that an attorney should not be permitted to verify the specifications except by order of the court for cause shown. See also In re Gift, 12 Am. B. R. 244, 130 Fed. 230; Milgraum v. Ost, 12 Am. B. R. 306, holding that attorneys will not be permitted to verify specifications unless exceptional circumstances exist. Contra, In re Peck, 9 Am. B. R. 747, 120 Fed. 972; In re Jamieson, 9 Am. B. R. 681,

## § 14a.]

## Specifications of Objection.

interest in resisting the discharge of the bankrupt, as one owning an unliquidated claim,<sup>35</sup> even though such person has not proven a debt.<sup>36</sup> Specifications must be clear and unequivocal, and contain specific averments of facts; they should be pleaded with greater particularity than complaints in civil actions; indeed, they more nearly resemble indictments, especially if the commission of one of the offenses against the law is relied on,<sup>37</sup> although the strict rules applicable to indictments may not apply.<sup>37a</sup> Where it is charged that the bankrupt has committed an act punishable by imprisonment under the Bankrupt Act it must be alleged to have been done "knowingly and fraudulently."<sup>37b</sup> If vague or general, or merely asserting acts which would render certain debts not dischargeable, but not affect the right to a discharge proper, they will be dismissed.<sup>38</sup> Amendments to correct error due to mistake or accident are usually allowed, if asked at any time prior to the submission of the case;<sup>39</sup> though it is doubtful whether a referee sitting as a special master can grant such allowance.<sup>40</sup> Defective specifications not objected to in the lower court cannot be objected

120 Fed. 697. An objection to specifications for lack of verification cannot be made after the case is submitted. In re Robinson, 10 Am. B. R. 477, 123 Fed. 844; In re Baerncopf, 9 Am. B. R. 133.

35. Ex parte Traphagen, Fed. Cas. 14,140.

36. In re Frice, 2 Am. B. R. 674, 96 Fed. 611. This was not so under the former law. Compare In re Murdock, Fed. Cas. 9,939. See also In re Beldon, Fed. Cas. 1,238, and In re Bush, Fed. Cas. 2,222.

37. In re Thomas, 1 Am. B. R. 515, 92 Fed. 912; In re Holman, 1 Am. B. R. 600, 92 Fed. 512; In re Hixon, 1 Am. B. R. 610, 93 Fed. 440; In re Hirsch, 2 Am. B. R. 715, 96 Fed. 468; In re Kaiser, 3 Am. B. R. 767, 99 Fed. 689; In re Peacock, 4 Am. B. R. 136, 101 Fed. 560; In re Pierce, 4 Am. B. R. 489, 102 Fed. 977; In re McGurn, 4 Am. B. R. 459, 102 Fed. 743; In re Quackenbush, 4 Am. B. R. 274, 102 Fed. 282; In re Gross, 5 Am. B. R. 271; In re Wolfensohn, 5 Am. B. R. 60; In re Idzall, 2 Am. B. R. 741, 96 Fed. 314.

37a. In re Blalock, 9 Am. B. R. 266, 118 Fed. 679.

37b. In re Blalock, supra; In re Patterson, 10 Am. B. R. 371, 121 Fed. 921; In re Peck, 9 Am. B. R. 747, 120 Fed. 972.

38. In re Hixon, ante; In re Holman, ante; In re Shepherd, 2 N. B. N. Rep. 1020; In re Hill, Fed. Cas. 6,482; In re Bellis, Fed. Cas. 1,275. Compare Bragassa v. St. Louis Cycle, 5 Am. B. R. 700, 107 Fed. 77; In re Blalock, 9 Am. B. R. 266, 118 Fed. 679; In re Parish, 10 Am. B. R. 548, 122 Fed. 553.

39. In re Quackenbush, 4 Am. B. R. 274, 102 Fed. 282; In re Carley, 8 Am. B. R. 720, 117 Fed. 130; In re Hixon, supra; In re Pierce, supra; In re Frice, supra; In re Morgan, 4 Am. B. R. 402, 101 Fed. 982; In re Mudd, 5 Am. B. R. 242, 105 Fed. 348; In re Osborne, 8 Am. B. R. 165, 115 Fed. 1; In re Glass, 9 Am. B. R. 391, 119 Fed. 509; Kentucky Nat. Bank v. Carley, 10 Am. B. R. 375, 121 Fed. 822; In re Gift, 12 Am. B. R. 244, 130 Fed. 230. See also In re Gross, 5 Am. B. R. 271, and In re Eaton, 6 Am. B. R. 531, 110 Fed. 731.

40. In re Osborne, supra; In re Peck, 9 Am. B. R. 747, 120 Fed. 972.

to on review.<sup>41</sup> The bankrupt need not answer;<sup>42</sup> the issue is made by the petition and the specifications. He may file exceptions to the latter, on the ground of insufficiency, or he may answer or demur if he chooses.<sup>43</sup> All objections to the sufficiency of specifications are waived unless made before trial.<sup>43a</sup>

*Reference to Special Master.*—The referee being denied jurisdiction to determine discharges,<sup>44</sup> references to him, not as referee, but as a special master in chancery to hear and report on the facts, are quite universal.<sup>45</sup> If such a reference is ordered, the special master sets a time and place for the hearing, which goes on before him as if before the judge. Special masters may pass on the relevancy or materiality of evidence,<sup>46</sup> and determine the sufficiency of specifications so far, at least, as to decide whether to permit testimony thereon.

*The Hearing.*—This is, in effect, a trial in equity, the burden of proof being on those who file the specifications.<sup>47</sup> The ordinary rules of evidence control. Proof must be strict and convincing, but not necessarily to the limit required in proving a crime.<sup>48</sup> Evidence will be confined to the specifications.<sup>49</sup> How far testimony brought out on the bankruptcy proceeding *per se* may be used as evidence on the discharge is a question; some authorities holding that it is material only for impeaching purposes.<sup>50</sup> The accepted rule seems to be that the bankrupt's evidence, but not that

41. In re Headley, 2 N. B. N. Rep. 684, and In re Kaiser, ante.

42. In re Logan, 4 Am. B. R. 525; In re Crist, 9 Am. B. R. 1, 116 Fed. 1007.

43. In re Rosenfeld, Fed. Cas. 12,059.

43a. In re Baldwin, 9 Am. B. R. 591, 119 Fed. 796.

44. § 38-a (4); General Order XII (3).

45. Fellows v. Freudenthal, 4 Am. B. R. 490, 102 Fed. 731; In re McDuff, 4 Am. B. R. 110, 101 Fed. 241; In re Rauchenplat, 9 Am. B. R. 763.

46. In re Kaiser, ante.

47. In re Idzall, 2 Am. B. R. 741, 96 Fed. 314; In re Brice, 4 Am. B. R. 355, 102 Fed. 114; In re Phillips, 3 Am. B. R. 542, 98 Fed. 844; In re Fitchard, 4 Am. B. R. 609, 103 Fed.

742; but this burden may shift, In re Wetmore, 2 Am. B. R. 755, 99 Fed. 703; In re Pierce, ante; In re Finkelstein, 3 Am. B. R. 800, 101 Fed. 418; or back again, In re Cashman, 4 Am. B. R. 326, 103 Fed. 67. Note also In re Ferris, 5 Am. B. R. 246, 105 Fed. 356; In re Wolfensohn, 5 Am. B. R. 60; In re Chamberlain, 11 Am. B. R. 95, 125 Fed. 629.

48. In re Gross, 5 Am. B. R. 271; In re Berner, 4 Am. B. R. 383; In re Greenberg, 8 Am. B. R. 94, 114 Fed. 773; In re Dauchy, 10 Am. B. R. 527, 122 Fed. 688.

49. In re Rosenfeld, ante.

50. In re Penny, 2 N. B. N. Rep. 1001. See "Use of Former Examination under § 7 (9)" in this Section, post.



of other witnesses, so far as it is material to the issues, may be so used.<sup>51</sup> The whole record of the bankruptcy case proper is frequently stipulated in. This practice is loose and should not be followed. The better method, where a stipulation is possible, is to cull out those portions that are pertinent, and read them in.

*Minutes and Report.*—The testimony may be taken down in narrative form, or by question and answer, and, if the latter, a stenographer may be employed, this perhaps by analogy to the procedure on the examination of the bankrupt.<sup>52</sup> Equity Rules LXXIII to LXXXII should be consulted for details of procedure on such hearings. The right of referees sitting as special masters to compensation in addition to their fees as referees has already been well settled,<sup>53</sup> and rests on the ground that the duties required of them are outside their functions as defined and paid for under the law. § 72, added by the amendatory act of 1903, has not, it is thought, affected this rule. This compensation is often fixed by district rules.<sup>54</sup> If not, it is adjusted under Equity Rule LXXXII. The disbursements of the special master, as for a stenographer, are, of course, allowed.<sup>55</sup> At the conclusion of the reference, the special master makes up a report,<sup>56</sup> embodying a summary of his findings and stating his opinion thereon, and files it, with his record and all papers and pleadings, with the clerk. This report is brought up on notice either on motion for confirmation or by exception, and the case then proceeds before the judge.<sup>57</sup>

**The Discharge.**—If the judge sustains the specifications or any of them, an order refusing the discharge is granted and entered;

51. In re Bard, 5 Am. B. R. 810, 108 Fed. 208; In re Wilcox, 6 Am. B. R. 362, 109 Fed. 628 (superseding In re Cooke, 5 Am. B. R. 434, 109 Fed. 631); In re Leslie, 9 Am. B. R. 561, 119 Fed. 406; In re Goodhile, 12 Am. B. R. 380, 130 Fed. 782. See also In re Gaylord, 5 Am. B. R. 410, 106 Fed. 833; affirmed, s. c., 7 Am. B. R. 1, 112 Fed. 668. Compare also In re Eaton, 6 Am. B. R. 531, 110 Fed. 731.

52. See General Order XXII.

53. Fellows v. Freudenthal, ante; In re Grossman, 6 Am. B. R. 510, 111 Fed. 507. In Bragassa v. St. Louis Cycle, 5 Am. B. R. 700, 107

Fed. 77, the referee seems to have been allowed extra compensation as referee and not as special master.

54. See, for rule in force in the Northern and Western Districts of New York, In re Gaylord, 5 Am. B. R. 805.

55. In re Grossman, supra.

56. See "Supplementary Forms," post. Compare In re Steed, 6 Am. B. R. 73; Mahoney v. Ward, 3 Am. B. R. 770.

57. Compare Equity Rules and the various district rules for the practice. See, for effect of findings of referee, In re Covington, 6 Am. B. R. 373, 110 Fed. 143; also, that findings of

such an order precludes another application in the same proceeding.<sup>58</sup> If he overrules them, an order of discharge follows. The referee's findings are not usually reversed except for palpable error.<sup>59</sup> Unlike the certificate under the former law, the discharge of to-day is silent as to the debts affected thereby.<sup>60</sup> Its effect can only be determined when it is asserted as a bar elsewhere.<sup>61</sup>

*Costs.*—Costs on contested applications for discharge are discretionary, and are often granted;<sup>62</sup> but not to the attorney for the bankrupt out of the estate.<sup>63</sup>

*Vacating Discharge.*—It has been held that, when, after discharge granted, it appears that a creditor has been bought off, this is *prima facie* evidence that the debtor was not entitled to discharge, and his discharge will be vacated.<sup>64</sup> The difference between such an order and one revoking a discharge should be noted.

### III. Subs. b. OBJECTIONS TO A DISCHARGE.

**Must Fall Within Statutory Grounds.**—As previously suggested, the specifications of objection must exhibit, and the evidence in support of them must prove, one of the objections specified in the law.<sup>65</sup> Even if the proof shows that the only debt is one which is not dischargeable, if the specifications are not sustained, a discharge should be granted.<sup>66</sup> But if one of several objections is

fact are conclusive on a petition for rehearing, *In re Royal*, 7 Am. B. R. 636, 113 Fed. 140.

58. *Matter of Feigenbaum*, 9 Am. B. R. 595, 57 C. C. A. 409, 121 Fed. 69, reversing 7 Am. B. R. 339.

59. *In re Covington*, *supra*.

60. See Form No. 59, and compare *Audubon v. Schufeldt*, 181 U. S. 575, 5 Am. B. R. 829. See also *In re Claff*, 7 Am. B. R. 128, 111 Fed. 506.

61. See under Section Seventeen, post, and compare for rulings in advance of discharge on application for stays, under Section Eleven, and later under this section, "Effect of the Discharge."

62. *In re Wolpert*, 1 Am. B. R. 546; *Bragassa v. St. Louis Cycle Co.*, 5 Am. B. R. 700, 107 Fed. 77; *In re Gaylord (D. C.)*, ante.

63. *In re Brundin*, 7 Am. B. R. 296, 112 Fed. 306.

64. *In re Dietz*, 3 Am. B. R. 316, 97 Fed. 563.

65. *In re Frank*, 6 Am. B. R. 156; *Smith v. Keegan*, 7 Am. B. R. 4, 111 Fed. 157; *In re Wetmore*, 6 Am. B. R. 703; *In re Steed*, 6 Am. B. R. 73, 107 Fed. 682; *Bauman v. Feist*, 5 Am. B. R. 703, 107 Fed. 83; *In re Pierce*, 4 Am. B. R. 554, 103 Fed. 64; *In re Black*, 4 Am. B. R. 776, 104 Fed. 289; *In re Peacock*, 4 Am. B. R. 136, 101 Fed. 560; *In re Marshall Paper Co.*, 4 Am. B. R. 468, 102 Fed. 872; *In re Logan*, 4 Am. B. R. 525, 102 Fed. 874; *In re Crist*, 9 Am. B. R. 1, 116 Fed. 1007. Contra, *In re Steindler*, 5 Am. B. R. 63.

66. *In re Tinker*, 3 Am. B. R. 580, 99 Fed. 79; *In re McCarty*, 7 Am. B. R. 40, 111 Fed. 151. Contra, *In re Maples*, 5 Am. B. R. 426, 105 Fed. 919.

well pleaded and sustained by the evidence, a discharge may be denied.<sup>66a</sup> The statutory objections are discussed *seriatim* below. Cases are, however, already so numerous, at least on the objections available before the amendatory act of 1903, that no attempt is made to phrase more than a few of the more important rules deducible therefrom. Those less important and the varied exceptions to them, may be ascertained from an examination of the cases cited in the foot-notes.

*Under the Original Law, and Under the Law as Amended.*—The additional objections made by the Act of 1903 are important and far-reaching.<sup>67</sup> So also are the changes in § 14-b (2). These are discussed later, and should be carefully noted.

**Subd. (1). The Commission of an Offense Punishable by Imprisonment under the Bankruptcy Law.**—This, in effect, means the commission of either of the offenses specified in the first and second subdivisions of § 29-b.<sup>68</sup> Those defined in the third, fourth, or fifth subdivision cannot well be committed by a bankrupt.<sup>69</sup> It has been thought also to include the commission of a contempt, though the use of the word "offense" necessarily negatives such a view.<sup>70</sup>

*Concealment of Property.*—To constitute this an objection to a discharge, it must be (1) by the bankrupt,<sup>71</sup> while a bankrupt or after his discharge—in other words, after the filing of the petition<sup>72</sup>—and (2) from his trustee, (3) of property belonging to the estate in bankruptcy, and (4) such concealment must be "knowingly and fraudulently" done. The latter is the most important of these elements, and, without clear proof sustaining it, the specifications must be dismissed.<sup>73</sup> Thus, an omission to include property in the schedules under an honest mistake of law or fact will

66a. *Hudson v. Mercantile Nat. Bank*, 9 Am. B. R. 432, 56 C. C. A. 250, 119 Fed. 346.

67. See pp. 183-186, post.

68. Note here Section Twenty-nine of this work.

69. See § 29-b (3) (4) (5).

70. A contempt, even though punished by imprisonment, is not a crime. The offense must be one under the bankruptcy law. § 29 indicates what constitutes such "offenses."

71. *In re Meyers*, 5 Am. B. R. 4,

105 Fed. 353. Compare *In re Hyman*, 3 Am. B. R. 169, 97 Fed. 195.

72. *In re Webb*, 3 Am. B. R. 386, 98 Fed. 404.

73. *In re Conn*, 6 Am. B. R. 217, 108 Fed. 525; *In re Pierce*, 4 Am. B. R. 554, 103 Fed. 64; *In re Freund*, 3 Am. B. R. 418, 98 Fed. 81; *In re Bryant*, 5 Am. B. R. 114, 104 Fed. 789; *In re Todd*, 7 Am. B. R. 770, 112 Fed. 315; *In re Patterson*, 10 Am. B. R. 371, 121 Fed. 921; *In re Blacklock*, 9 Am. B. R. 266, 118 Fed. 679. See also *In re Beebe*, 8 Am. B. R. 507, 116 Fed. 48.

not bar a discharge.<sup>74</sup> But, if such omission is not satisfactorily explained, it will usually amount to a concealment.<sup>75</sup> Whether an omission to schedule property fraudulently conveyed amounts to a concealment is a question; the better opinion is that it does,<sup>76</sup> though lapse of time will often be sufficient excuse.<sup>77</sup> This question often arises where property has been given or transferred by a bankrupt to his wife. It seems, however, that an omission of assets from the schedule, on the advice of counsel, honestly given, is at least a presumptive excuse.<sup>78</sup> Where a person prior to filing a petition in bankruptcy conveys property to a third person, to be held, in whole or in part, in secret trust for himself, and fails to schedule such interest, such failure constitutes a knowing and fraudulent concealment from his trustee, while a bankrupt, of property belonging to his estate in bankruptcy, and will preclude his discharge.<sup>78a</sup> Real property set apart to a divorced wife as alimony is not within the jurisdiction of a court in bankruptcy,<sup>78b</sup> and a failure to schedule such property does not constitute a concealment so as to defeat the wife's right to a discharge.<sup>78c</sup> Other less important rules will be deduced from the cases cited in the foot-notes.

*Evidence of Concealment of Assets.*—A willful and fraudulent concealment of assets by a bankrupt need only be shown by a fair preponderance of credible evidence.<sup>78d</sup> Where objecting credi-

74. In re Morrow, 3 Am. B. R. 263, 97 Fed. 574; In re Wetmore, 3 Am. B. R. 700, 99 Fed. 703; In re Blalock, 9 Am. B. R. 266, 118 Fed. 679. But see In re Eaton, 6 Am. B. R. 531, 110 Fed. 731.

75. In re Royal, 7 Am. B. R. 106, 112 Fed. 135; In re Finkelstein, 3 Am. B. R. 800, 101 Fed. 418; In re O'Garra, 3 Am. B. R. 349, 97 Fed. 932. For such an explanation, see In re Miner, 8 Am. B. R. 248.

76. Bragassa v. St. Louis Cycle, 5 Am. B. R. 700, 107 Fed. 77; In re Skinner, 3 Am. B. R. 163, 97 Fed. 190; In re Welch, 3 Am. B. R. 93, 109 Fed. 65; In re Ferguson, 2 Am. B. R. 586; In re McNamara, 2 Am. B. R. 566; In re Quackenbush, 4 Am. B. R. 274, 102 Fed. 282.

77. In re Goodale, 6 Am. B. R. 493, 109 Fed. 783; In re House, 4 Am. B. R. 603, 103 Fed. 616.

78. In re Schreck, 1 Am. B. R. 366; In re Berner, 4 Am. B. R. 383; In re Headley, 2 N. B. N. Rep. 684; U. S. v. Connor, 3 McLean, 573. But see In re Stoddard, 7 Am. B. R. 762, 114 Fed. 486.

78a. In re Breiner, 11 Am. B. R. 684, 129 Fed. 155; In re Dauchy, 10 Am. B. R. 527, 122 Fed. 688; In re Fleischman, 9 Am. B. R. 557, 120 Fed. 960; Hudson v. Mercantile Nat. Bank, 9 Am. B. R. 432, 56 C. C. A. 250, 119 Fed. 346; In re Becker, 5 Am. B. R. 438, 106 Fed. 54; In re Bemis, 5 Am. B. R. 36, 104 Fed. 672; In re Welch, 3 Am. B. R. 93, 100 Fed. 65.

78b. Audubon v. Shufeldt, 5 Am. B. R. 829, 181 U. S. 575.

78c. In re Le Claire, 10 Am. B. R. 733, 124 Fed. 654.

78d. In re Greenberg, 8 Am. B. R. 94; In re Howden, 7 Am. B. R. 194; In re Gaylord, 7 Am. B. R. 1, 112 Fed. 668.

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False Oath in Proceeding.

tors have made a *prima facie* case the burden is on the bankrupt to so weaken it by credible evidence as to present a question of fact.<sup>78e</sup>

*Continuing Concealment.*—Concealment being possible only if the person is "a bankrupt," strictly, a concealment accomplished before the bankruptcy is not within the penalty of the statute. This limitation has, however, led to the doctrine of "continuing concealment," which is now generally recognized.<sup>79</sup> Such a concealment once begun necessarily continues after the bankruptcy and is, therefore, "from his trustee." Whether it is also of "property belonging to his estate in bankruptcy" is sometimes a difficult question, and usually turns on the *bona fides* of the transaction through which possession and title passed from the bankrupt. No hard and fast rule can be phrased; the cases rest each on its own facts.<sup>80</sup>

*Miscellaneous Cases.*—In the foot-notes will be found a number of cases, not previously cited, in all of which the commission of the offense of concealment has been alleged.<sup>81</sup>

**A False Oath in the Proceeding.**—Much that has been said in the previous paragraphs applies with equal force here. The oath, if

78e. In re Leslie, 9 Am. B. R. 561, 119 Fed. 406. In this case it was held that an unexplained shrinkage in the bankrupt's assets of about \$12,000 within a year of his bankruptcy is insufficient proof that he had that amount of money at the time of filing his petition and concealed it from his creditors and the trustee. See also In re Blalock, 9 Am. B. R. 266, 118 Fed. 679; In re Baernkopf, 9 Am. B. R. 133; In re Semmel, 9 Am. B. R. 356, 118 Fed. 457 (in which case it was held that the bankrupt could not be charged with concealing shares of stock because he had undervalued them, but that fact, as well as the fact that he did not name the stock, was a circumstance of more or less weight on the question of concealment, if there was further evidence to bear it out).

79. Thus, see In re Quackenbush, supra; In re Bemis, 5 Am. B. R. 36, 104 Fed. 672.

80. In re Marsh, 6 Am. B. R. 537, 109 Fed. 602; In re Adams, 4 Am. B. R. 696, 104 Fed. 72; In re Fitchard, 4 Am. B. R. 609, 103 Fed. 742.

81. *Discharge granted:* In re Locks, 5 Am. B. R. 136, 104 Fed.

783; In re Hirsch, 3 Am. B. R. 344, 97 Fed. 571; In re Cornell, 3 Am. B. R. 172, 97 Fed. 29; In re Polakoff, 1 Am. B. R. 358; In re Lesser, 8 Am. B. R. 15, 114 Fed. 83, reversing s. c., 5 Am. B. R. 330; In re Countryman, 9 Am. B. R. 572, 119 Fed. 637; In re Semmel, 9 Am. B. R. 351, 118 Fed. 487.

*Discharge refused:* In re Schenck, 8 Am. B. R. 727, 116 Fed. 554; In re Bullwinkle, 6 Am. B. R. 756, 111 Fed. 364; In re Cabus, 6 Am. B. R. 156; Ablowich v. Stursburg, 5 Am. B. R. 403, affirming In re Ablowich, 3 Am. B. R. 586, 99 Fed. 81; Fields v. Karter, 8 Am. B. R. 354, 115 Fed. 950; In re Gross, 5 Am. B. R. 271; In re Heyman, 4 Am. B. R. 735, 104 Fed. 677; In re Hoffmann, 4 Am. B. R. 331, 102 Fed. 970; In re Dews, 3 Am. B. R. 691, 96 Fed. 181; In re Holstein, 8 Am. B. R. 150, 114 Fed. 794; In re Greenberg, 8 Am. B. R. 94, 114 Fed. 773.

*On appeal:* In re Otto, 8 Am. B. R. 305, 115 Fed. 860; Osborne v. Perkins, 7 Am. B. R. 250, 112 Fed. 127; In re Covington, 6 Am. B. R. 373, 110 Fed. 143.

available as an objection to a discharge, must be (1) "in or in relation to any proceeding in bankruptcy;"<sup>82</sup> and (2) it must have been knowingly and fraudulently made.<sup>83</sup> Such an oath would also amount to perjury. A common instance is where a bankrupt swears that his schedule of property is a statement of "all his estate, both real and personal," and he has knowingly or fraudulently omitted assets therefrom.<sup>83a</sup> Thus, the same act may be both a false oath and a concealment.<sup>84</sup> The analogy of this objection to a crime usually compels strict pleading and even stricter proof.<sup>85</sup>

*Use of Former Examination under § 7 (9).*—This same analogy has led to much confusion concerning the right to predicate such an objection on a false oath during the bankrupt's examination. It seems not to be doubted that on any oath voluntarily taken this objection may rest;<sup>86</sup> but it has been vigorously denied that a false oath under compulsion can be made the basis of an objection to a discharge. The earlier cases were quite uniform that it could not; this on the ground that, by § 7 (9), the evidence then adduced could not be used against a bankrupt in a criminal proceeding.<sup>87</sup> This view has, however, now been exploded.<sup>88</sup> It is a torturing of words to call a proceeding on discharge a criminal proceeding, merely because the same facts if proven in support of an indictment might result in conviction for crime. The contention that to permit the use of such testimony "would set a trap for the debtor" has been well answered by a distinguished judge to the effect that the opposite rule "would set a trap for the creditors, or else so set the trap that the debtor could get all the bait (the discharge) and yet not spring the trap."<sup>89</sup>

<sup>82.</sup> Compare, for practice, *In re Goodale*, 6 Am. B. R. 493, 109 Fed. 783.

<sup>83.</sup> *In re Bryant*, 5 Am. B. R. 114, 104 Fed. 789; *In re Salisbury*, 7 Am. B. R. 771, 113 Fed. 833; *In re Beebe*, 8 Am. B. R. 597, 116 Fed. 48. Compare also cases under foot-note 73, p. 177, ante.

<sup>83a.</sup> *In re Breiner*, 11 Am. B. R. 684, 129 Fed. 155; *In re Gailey*, 11 Am. B. R. 539 (C. C. A.), 127 Fed. 538; *In re Ranchenplat*, 9 Am. B. R. 763 (Dist. Ct. Porto Rico); *In re Semmel*, 9 Am. B. R. 351, 118 Fed. 487.

<sup>84.</sup> *In re Becker*, 5 Am. B. R. 438, 106 Fed. 54.

<sup>85.</sup> *In re Howden*, 7 Am. B. R. 191, 111 Fed. 723; *In re Gaylord*, 5 Am. B. R. 410, 106 Fed. 833. See also this case on appeal, 7 Am. B. R. 195, 111 Fed. 717.

<sup>86.</sup> See reasoning in cases immediately post.

<sup>87.</sup> *In re Goldsmith*, 4 Am. B. R. 234, 101 Fed. 570; *In re Marx*, 4 Am. B. R. 521, 102 Fed. 676; *In re Logan*, 4 Am. B. R. 525, 102 Fed. 876.

<sup>88.</sup> *In re Dow*, 5 Am. B. R. 400, 105 Fed. 889; *In re Gaylord*, 7 Am. B. R. 195, 111 Fed. 117, affirming s. c., 5 Am. B. R. 410, 106 Fed. 833.

<sup>89.</sup> *In re Dow*, supra.

*Illustrative Cases.*—The false oath must be on a matter material to the inquiry,<sup>90</sup> and it has been held that it must have been made in the proceedings in which the bankruptcy of the petitioner was to be adjudicated and his estate administered.<sup>90a</sup> But, if the false oath was due to a mistake in fact or the result of honest advice of counsel, a discharge will not usually be refused.<sup>91</sup> Cases where the bankrupt swears falsely to an account in the proceeding are rare. Usually such an oath would also amount to a false oath proper, and might often to a concealment. There are as yet no authorities in point. Additional cases where this ground of objection has been considered will be found in the foot-note.<sup>92</sup>

### Subd. (2). Failure to Keep, Destruction, or Concealment of Books.

—The amendatory act of 1903 has here greatly modified the elements of pleading and proof. These changes have already been indicated.<sup>93</sup> The clause in its original form was highly objectionable, in particular, in that it required proof that the act complained of was “in contemplation of bankruptcy,”<sup>94</sup> which was held to mean in contemplation of a bankruptcy proceeding. This requirement has been dropped out.<sup>95</sup> So have the adjectives “fraudulent,” as perhaps narrowing the meaning of “intent,” and “true,” as redundant

90. Compare, for testimony in state court, *In re Eaton*, 6 Am. B. R. 531, 110 Fed. 731; and, to effect that testimony other than by the bankrupt is inadmissible, *In re Wilcox*, 6 Am. B. R. 362, 109 Fed. 628; *In re Strouse*, 2 N. B. N. Rep. 64; *In re Huber*, 1 N. B. N. 431.

90a. *In re Blalock*, 9 Am. B. R. 266, 118 Fed. 679.

91. *In re Eaton*, *supra*. See also cases cited under foot-note 74, p. 177, ante.

92. *Discharges granted*: *Bauman v. Feist*, 5 Am. B. R. 703, 107 Fed. 83; *In re Crenshaw*, 2 Am. B. R. 623; *In re Bates*, 5 Am. B. R. 848. But compare *In re Roy*, 3 Am. B. R. 37, and *Sellers v. Bell*, 2 Am. B. R. 529, 94 Fed. 801.

*Discharges refused*: *In re Grossman*, 6 Am. B. R. 510, 111 Fed. 507; *In re Gamman*, 6 Am. B. R. 482, 109 Fed. 312; *In re Lesser Bros.*, 5 Am. B. R. 330 (reversed on appeal 8 Am. B. R. 15, 114 Fed. 83). *In re Lewin*, 4 Am. B. R. 636, 103 Fed. 852;

*In re Lowenstein*, 2 Am. B. R. 193, 106 Fed. 51; *In re Williams*, 2 N. B. N. Rep. 206.

93. See text of § 14-b (2) at head of this Section of this work.

94. *In re Spear*, 4 Am. B. R. 617, 103 Fed. 779; *In re Marx*, 4 Am. B. R. 521, 102 Fed. 676; *In re Morgan*, 4 Am. B. R. 402, 101 Fed. 982; *In re Berkowitz*, 4 Am. B. R. 37; *Van Ingen v. Schophofen*, 12 Am. B. R. 24 (C. C. A.), 129 Fed. 352. But see *In re Feldstein*, 8 Am. B. R. 160, 115 Fed. 259.

95. The reasons for these changes are indicated in a Report of the Executive Committee of the National Association of Referees in Bankruptcy, published in March, 1900, as follows: “The necessity of proving intent to conceal condition, coupled with the still more difficult element of ‘contemplation of bankruptcy,’ which means bankruptcy per se, and not mere insolvency, has rendered this objection all but useless.”

when limiting the words "financial condition." These changes, however, by no means bring the law in this regard up to the level of its predecessor. Intent to conceal condition is still necessary. The former law, like the English law, made mere failure by a merchant or tradesman to keep proper books of account an objection to discharge; proof of intent was essential only when falsifying books was charged.<sup>96</sup>

*Elements of Proof.*—To sustain this objection, the proof must now show that (1) the act complained of was done after the passage of the bankruptcy law, (2) by the bankrupt or by some one acting under his direction, (3) with intent to conceal his financial condition; and (4) the act must consist of either destruction, concealment — which, as has been seen, includes secreting, falsifying, and mutilating<sup>97</sup> — or failure to keep books of account or records from which the bankrupt's condition might be ascertained. The first of these elements flows by implication from the words of the law.<sup>98</sup> The second is equally clear.<sup>99</sup> It has even been held that a falsifying of books by the bankrupt's partner is not an objection to his discharge.<sup>100</sup> The third element means much the same as "knowingly and fraudulently" discussed in a previous paragraph.<sup>101</sup> The dropping out of the word "fraudulent" has made some of the cases no longer in point. Mere *scienter* and a purpose to conceal, without, however, the additional purpose by such concealment to defraud, are enough. The change, therefore, becomes important, and the decisions of the courts will be awaited with interest. The fourth element is sufficiently indicated by the words of the statute. The phrasing here is even broader than was that of the law of 1867. Any act or series of acts with relation to business records which may reasonably be held to be within the meaning of "destruction," "concealment," "secreting," "falsifying," "mutilation," or "failure to keep" will be within the interdiction of the law.

*Illustrative Cases.*—The burden is, of course, on the objecting creditor, and the act must be shown by a clear preponderance of

96. Law of 1867, § 29, R. S., § 5110.

97. See § 1 (22).

98. In re Shertzer, 3 Am. B. R. 699, 99 Fed. 706; In re Lieber, 3 Am. B. R. 217; In re Carmichael, 2 Am. B. R. 815, 96 Fed. 594; In re Shorer, 2 Am. B. R. 165, 96 Fed. 90; In re Stark, 1 Am. B. R. 180; In re Polakoff, 1 Am. B. R. 358.

99. In re Hyman, 3 Am. B. R. 169, 97 Fed. 195.

100. In re Schultz, Jr., 6 Am. B. R. 91, 109 Fed. 264.

101. In re Allendorf, 12 Am. B. R. 320, 129 Fed. 981; In re Mackenzie, 12 Am. B. R. 605. See p. 177, ante.



## § 14b (3).] False Statement as to Financial Condition.

evidence;<sup>102</sup> but not, it is thought, with the same degree of certainty as in the objections already discussed. Mere failure to keep books and records is not enough,<sup>102a</sup> but if the failure to keep such books is with an intent to conceal the bankrupt's financial condition, the offense is established, and an allegation in the specifications of objections to the effect that the bankrupt did with intent to conceal his financial condition fail to keep books of account or records from which such condition might be ascertained, is sufficient, although it did not specify what books of account the bankrupt should have kept.<sup>102b</sup> Where a person keeps books in such a condition as to be suspicious on their face, a discharge should be refused.<sup>103</sup> The destruction of vouchers or other business papers is as fatal as would be the destruction of books.<sup>103a</sup> All books and records which are material to a proper understanding of the bankrupt's financial condition are within the protection of the act.<sup>103b</sup> Other cases where this objection has been urged against a discharge will be found in the foot-note.<sup>104</sup> The practitioner is, however, warned against those cases which turn on the existence of a "contemplation of bankruptcy" or a "fraudulent" intent to conceal condition. These elements, as has been seen, are no longer the law.

**Subd. (3). Obtaining Property on Credit on a False Written Statement of Financial Condition.**— This new objection to a discharge will prove the most valuable only to careful traders. As phrased in the Ray bill of 1902, it was in effect the same as that found in the

102. In re Boasberg, 1 Am. B. R. 353.

102a. In re Blalock, 9 Am. B. R. 266, 118 Fed. 679.

102b. Godshalk Co. v. Sterling, 12 Am. B. R. 302 (C. C. A.), 129 Fed. 580; In re Ginsburg, 12 Am. B. R. 459, 130 Fed. 627; In re Patterson, 10 Am. B. R. 371, 121 Fed. 921. But see In re Milgraum v. Ost, 12 Am. B. R. 306, 129 Fed. 827.

103. In re Leopold, 5 Am. B. R. 278.

103a. Godshalk Co. v. Sterling, 12 Am. B. R. 302 (C. C. A.), 129 Fed. 580 (as to checks and check stubs); Matter of Studebaker, 11 Am. B. R. 384, 127 Fed. 951, reversing 10 Am. B. R. 205, 124 Fed. 945.

103b. In re Conley, 9 Am. B. R. 496, 120 Fed. 42.

104. *Discharges granted:* Bauman v. Feist, 5 Am. B. R. 703, 107 Fed. 83; In re Corn, 5 Am. B. R. 478, 106 Fed. 143; Sellers v. Bell, 2 Am. B. R. 529; In re Dews, ante; In re Lafleche, 6 Am. B. R. 483, 109 Fed. 307; In re Rauchenplat, 9 Am. B. R. 763 (Dist. Ct. Porto Rico).

*Discharges refused:* In re Morgan, 4 Am. B. R. 402; In re Idzall, 2 Am. B. R. 741, 96 Fed. 314; In re Kenyon, 7 Am. B. R. 527, 112 Fed. 658; In re McBachron, 8 Am. B. R. 732, 116 Fed. 783.

*On appeal:* In re Pierce, ante; In re Feldstein, 6 Am. B. R. 458; affirmed, s. c., 8 Am. B. R. 160, 115 Fed. 259.

## False Statement as to Financial Condition. [§ 14b (3).

Torrey bill and incorporated from it into the Henderson substitute.<sup>105</sup> The Senate, however, rephrased the clause and greatly limited its scope.

*Elements of Proof.*—The creditor alleging this objection must prove that the bankrupt (1) obtained property on credit, that he did so on (2) a statement of his financial condition relied on by the creditor, that such statement was (3) in writing, that it was (4) materially false, and (5) that it was so made for the purpose of obtaining such property from such creditor. To these should be added the usual elements, that the obtaining of property must have been (6) by the bankrupt or by some one duly authorized by him, and perhaps since the amendatory act became a law.<sup>105a</sup> The effect of this new objection will be that every tradesman, whose credit is not unquestioned, will be asked to give a mercantile statement as a condition precedent to dealing, and, it may be suggested, a new statement with every new transaction.

*Meaning of the Clause.*—Nothing like this clause appears in any previous bankruptcy law.<sup>106</sup> Even the English law has no equivalent, though there, one who at the time of contracting a debt had not a reasonable expectation of paying it, is denied a discharge.<sup>107</sup> In effect, the objection means that, where a creditor has been defrauded in a given sale on credit by the purchaser's material misstatements as to his financial condition given for the purpose of accomplishing such purchase, the creditor has the option of interposing a bar to a discharge affecting all debts, or of permitting the discharge to be granted, and then asserting his claim on after-acquired property, on the ground that his claim is not affected by the discharge. In the absence of decisions, the following suggestions are advanced touching the various elements of proof:

(1) *Obtaining property on credit.*—These words need no elucidation. All business transactions, other than for cash, fall within the phrase.

105. Senate bill 1035, in 55th Congress, First Session, introduced by Senator Lindsay on March 22, 1897, § 51-b (3), and § 13-b (3), of the Henderson substitute bill, p. 2039, vol. 31, Cong. Rec., 55th Congress, Second Session. See also Report of Ex. Com. of Nat. Assn. of Referees in Bankruptcy, published in March, 1900, p. 17.

105a. In re Scott, 11 Am. B. R. 327, 126 Fed. 981 (in which case it was held that the amendment would apply to a false statement to obtain credit made before the amendment became a law). See also In re Petersen, 10 Am. B. R. 355.

106. Compare In re Steed, 6 Am. B. R. 73, 107 Fed. 682.

107. Act of 1890, § 8 (3) (d).

## § 14b (3).] False Statement as to Financial Condition.

(2) *A statement of financial condition.*—A mere letter, if otherwise within the clause, would seem enough. Details are unnecessary, but the statement ought at least to inform the creditor of the net worth of the debtor, or perhaps of the total of his assets and liabilities. In a majority of cases, these statements will be made on blanks calling for items, and so phrased as to avoid some of the legal pitfalls noted later.

(3) *In writing.*—Of this, the framers of the amendatory law have said:

This objection, as is proper, will be of no avail when a commercial report is obtained in the haphazard fashion of a hasty interview. The statement must be in writing, which, of course, implies the signature of the person to be charged thereby.

How far a statement made by an employee will avail depends, of course, on the authority given him by his employer and the latter's acquiescence.

(4) *Materially false.*—The falsity of the statement must be proven. So, it is thought, should the fact either that the debtor knew it to be false, or at least did not know it to be true.<sup>108</sup> It is not usually necessary to show intention to deceive, but intention is always material as an element of proof.<sup>109</sup> Intention to deceive is, of course, different from a purpose "of obtaining such property on credit." The statement also must be material to the transaction;<sup>110</sup> it must have been, if not the moving cause of the sale on credit, a contributing cause, *i. e.*, the seller must to an extent at least have relied on it.<sup>111</sup> A fair test would seem to be: was the statement so "materially false" as to warrant a suit for the rescission of the sale? Numerous decisions in the state courts determining what are actionable false representations may be consulted with profit.

(5) *For the purpose of obtaining such property from the creditor.*—This element will presumably always exist where a sale results from the statement. At the same time, there must be some proof of intention, though it need not amount to intent to defraud. The inter-

108. Schwabacher v. Riddle, 99 Ill. 343; Lynch v. Mercantile Trust Co., 18 Fed. 486; Stone v. Covell, 29 Mich. 359; Cooper v. Schlesinger, 111 U. S. 148; In re Russell, 5 Am. B. R. 608.

109. In re Epstein, 6 Am. B. R. 60, contra to In re Russell, supra; Turner v. Ward, 154 U. S. 618. Compare, also, In re Steed, ante.

110. Addington v. Allen, 11 Wend. (N. Y.) 375; Bruce v. Burr, 67 N. Y. 237; Hanna v. Rayburn, 84 Ill. 533.

111. In re Goodhile, 12 Am. B. R. 380, 130 Fed. 782. See In re Gany,

esting question, as to how far a false statement once made may be availed of by a creditor who subsequently sells a second or other bill of goods, without asking a new statement or for a correction of the old,<sup>112</sup> is not important since the Senate's amendments to the Ray bill. The crucial words are "such property." They limit this objection in a way that will prove troublesome in practice. Statements made to mercantile agencies, unless, perhaps, in the form of special reports, the giving of which by the purchaser can be proven to have been "for the purpose" of the identical credit in question, will, it is thought, be of no value as objections to discharges. The striking out from the Ray bill by the Senate of the words "or of being communicated to the trade" is significant.

(6) *By the bankrupt*.—This follows from the nature of the transactions here, in a sense, interdicted.<sup>113</sup>

*When this Clause went Into Effect*.—This is discussed under the "Supplemental Section to Amendatory Act," *post*.

**Subd. (4). Made a Fraudulent Transfer.**—Under the law of 1867, the making of both a fraudulent preference and a fraudulent transfer were objections to discharge. The original draft of the present amendatory bill did the same.<sup>114</sup> Under the definition of transfer,<sup>115</sup> it is difficult to conceive of a preference that does not amount to a transfer, and, if fraudulent, either transaction will come within the present clause. An equivalent objection will be found in the Torrey bill and the Henderson substitute. The rephrasing of the clause by the Senate has not, it is thought, materially weakened the corresponding clause of the Ray bill save in adding the four months' limitation. The words of subdivision (4) are doubtless a definition or explanation of the words "fraudulent transfer" there used.

*Elements of Proof*.—The creditor alleging this objection must show, in substance, the commission of the first act of bankruptcy. The variances between the phrasing here and that of § 3-a (1) are immaterial. "Destroyed" occurs here only, but it adds nothing, as "removed" may include it and "concealed"<sup>116</sup> surely does. The

4 Am. B. R. 576. Compare *People v. Barton*, 47 N. Y. 167; *Perley v. Cat-Haynes*, 11 Wend. 557; *Phelps v. lin*, 31 Ill. 533.

Court, 83 N. Y. 436.

112. In re Russell, *supra*.

113. As to fraud practiced by an agent of the bankrupt, see *Durst v.*

114. Compare Report of Ex. Com. of National Association of Referees in Bankruptcy, previously mentioned.

115. See § 1 (25).

116. § 1 (22).

words of limitation refer to the four months' bankruptcy period, discussed in Section Three, *ante*. How far an adjudication on the first act of bankruptcy will be *res adjudicata* on an objection to a discharge need not be considered; a court which finds the first will not easily be persuaded to refuse to find the second. Nor is any discussion as to the technical meaning of the words important. Any transfer, destruction, or concealment of property within the inhibition of the Statute of Frauds, if in the four months' period, will, if seasonably pleaded and duly proven, bar a discharge. If the transfer be made within the limited period it will be a bar although not knowingly and fraudulently made.<sup>116a</sup> If made prior to the four months' period it is no bar, even if made for the purpose of defeating a just claim.<sup>116b</sup> Cases cited in the proper paragraphs of Section Three of this work will be found valuable.<sup>117</sup> Other cases are collected in the foot-note.<sup>118</sup>

*Are General Assignments Objections to Discharges?*—A question which may arise under this clause is whether a previous general assignment is a bar to a discharge. That such an assignment is a transfer is elementary; that it amounts to an intent to hinder or delay creditors is now thought well settled.<sup>119</sup> It would seem to follow, that if within the interdicted period, a general assignment is a sufficient objection to a discharge. The question is fraught with large results, as one of the defects in the administration of the law rests on the proneness of failing debtors to assign under the state systems, thus accomplishing troublesome conflicts of jurisdiction and often mulcting their estates in double fees. An authoritative ruling that general assignments are sufficiently fraudulent to bar a discharge would thus solve many problems. Debtors desiring discharges would not then care to assign.

116a. *In re Gift*, 12 Am. B. R. 244, 130 Fed. 230.

116b. *In re Brumbaugh*, 12 Am. B. R. 204, 128 Fed. 971. See *In re Dauchy*, 11 Am. B. R. 511 (C. C. A.), 130 Fed. 532.

117. See pp. 36-38, *ante*.

118. *In re Freeman*, Fed. Cas. 5,082; *In re Hannahs*, Fed. Cas. 6,032; *In re Wolfskill*, Fed. Cas. 17,930. Compare *In re Diehl*, 15 Fed. 234. And see *In re Jones*, Fed. Cas. 7,446.

119. *In re Gutwillig*, 1 Am. B. R. 78, 90 Fed. 475; s. c., on appeal, 1 Am. B. R. 388, 92 Fed. 337; *In re*

*Harper*, 3 Am. B. R. 804, 100 Fed. 266; *In re Macon Sash, etc.*, 7 Am. B. R. 66, 112 Fed. 323; as, however, reversed by *Carling v. Seymour Lumber Co.*, 8 Am. B. R. 29, 113 Fed. 483; *Scheuer v. Smith*, 7 Am. B. R. 384, 112 Fed. 407; *In re Milgraum v. Ost*, 12 Am. B. R. 306, 129 Fed. 827 (as to sufficiency of specifications). Compare also, under the former law, *In re Chadwick et al.*, Fed. Cas. 2,569; *In re Pierce*, Fed. Cas. 11,141; *Haas v. O'Brien*, 66 N. Y. 597; *Mayer v. Hellman*, 91 U. S. 496.

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Previous Discharge; Refusal to Obey, etc. [§ 14b (5), (6).]

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**Subd. (5). Been Granted a Previous Discharge in a Voluntary Bankruptcy within Six Years.**—The purpose of this clause is clear. Through oversight, the original law permitted discharges *ad libitum*, and instances of two and even three discharges to the same person in as many years are on record. The English law does not permit a second application, no matter after what duration of time.<sup>120</sup> The law of 1867 allowed it only when the bankrupt's estate was sufficient to pay seventy per cent., but three-fourths of his creditors in value could consent to a discharge on his paying a smaller amount.<sup>121</sup> The present clause is apparently an effort to omit the too harsh provisions of the former, and, at the same time, to escape the dangers lurking in any devise which calls for the consent of creditors.<sup>122</sup> As originally drafted it referred to both voluntary and involuntary bankrupts. The Senate, however, so modified it that this objection is available only to creditors of voluntary bankrupts. As to its effect where the creditors petition, but the bankrupt either consents to an adjudication or petition, and is adjudicated while the involuntary proceeding is pending, *quære?* If application for a discharge has been made and it has neither been granted nor refused, the limitation of the clause would not seem applicable. If an application for a discharge had been refused in one proceeding the question of the bankrupt's right to discharge from the same debts in a subsequent proceeding is *res adjudicata*.<sup>122a</sup> And where a discharge has been granted in voluntary proceedings a second discharge cannot be granted within six years in an involuntary proceeding.<sup>122b</sup> The six years unquestionably begin to run from the date of the order granting the discharge.

*When this Clause went into Effect.*—This is considered under the "Supplemental Section to Amendatory Act," *post*.

**Subd. (6). Refusal to Obey a Lawful Order, or to Answer a Material Question Approved by the Court.**<sup>123</sup>—The nearest equivalent to this new objection is found in the Act of 1841, whereby a discharge might be denied a bankrupt who should "willfully omit or

<sup>120</sup>. Act of 1890, § 8 (3) (k).

<sup>121</sup>. § 30, R. S., § 5116.

<sup>122</sup>. See Report of Ex. Com. of National Association of Referees in Bankruptcy, p. 18, previously mentioned.

<sup>122a</sup>. Kuntz v. Young, 12 Am. B. R. 505, 131 Fed. 719.

<sup>122b</sup>. Matter of Neely, 12 Am. B. R. 407.

<sup>123</sup>. Note remarks of Judge Brawley, in *In re Nachman*, 8 Am. B. R. 180, 114 Fed. 995.

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refuse to comply with any orders or directions of such court.”<sup>124</sup> Refusal to obey or to answer are in despite of the court, and the bankrupt may well say he thereby became liable for nothing more than a contempt. The amendatory act has added another consequence. Recalcitrancy is now also an objection to his discharge. But it must be “in the proceedings in bankruptcy.”

*Refusal to Obey.*—This seems to include failure to answer questions, provided the order requiring the answer is lawful. As has been seen, the words “lawful orders” occur elsewhere in the act. Whether the order is lawful or not will often be the only question. If authorized in words or by implication from the statute, it will be; but the cases where the bankrupt may be ordered to do or not to do a certain thing are too numerous to permit discussion here. Contempt of court, provided the order ignored was lawful, under this clause, becomes thus in effect an available objection to discharge. It is suggested, however, that mere neglect, not amounting to refusal to obey, would not be sufficient.

*Refusal to Answer.*—This is not essentially different from refusal to obey. On refusal to answer a proper question, the court will usually order the bankrupt to answer. These words were inserted as a means to compel replies where the bankrupt asserts his privilege.<sup>125</sup> It is not thought that this clause is in conflict with the fifth amendment to the Constitution.<sup>126</sup> Until there is an authoritative decision, however, further discussion is in the domain of prophecy, not law.

*When This Clause Went into Effect.*—This is discussed under the “Supplemental Section to Amendatory Act,” *post*.

#### IV. Subs. c. EFFECT OF COMPOSITION.

**On Debts Old and New.**—This subject has already been discussed in another place.<sup>127</sup> A composition when confirmed acts as a discharge on all debts other than those which originated in or are a part of the composition.

#### V. EFFECT OF DISCHARGE.

**In General.**—A discharge goes to the remedy; it does not cancel the debt. It destroys the remedy on all debts except those falling

<sup>124.</sup> Act of 1841, § 4.

<sup>125.</sup> See p. 115, ante.

<sup>126.</sup> See foot-note 123, *supra*.

<sup>127.</sup> See under Section Twelve, p. 159, ante.

within the terms of § 17-a, discussed later.<sup>128</sup> Its effect on partnership debts and the debts of corporations has already been considered;<sup>129</sup> its effect on the liabilities of codebtors will be examined later.<sup>130</sup>

**On Liens.**— A discharge is personal to the debtor. It follows, therefore, that a lien in good faith is not affected thereby.<sup>131</sup> This doctrine should not, however, be confused with the other which voids all liens through legal proceedings if within four months of the bankruptcy.<sup>132</sup> Liens continuing valid, it often becomes necessary to destroy their effect on possible after-acquired property. Hence, the provisions in the state laws, permitting proceedings to compel the cancellation of docketed judgments barred by a discharge.<sup>133</sup>

**Discharge Must be Plead.**— Being a bar to the remedy it must be pleaded.<sup>134</sup> The better practice is to procure a stay of all pending suits and to stay those that may be brought while the proceeding is pending, and then, when the discharge is granted, to plead it.<sup>135</sup> It seems, however, that a judgment entered after a petition is filed, but before the discharge, is a mere debt, and the discharge can be used as a bar to proceedings to enforce it. A judgment entered after the discharge, no matter when the suit was begun, is valid even as to the discharge; by not pleading it, the defendant has waived its benefits. These well-recognized principles are also considered elsewhere.<sup>136</sup>

128. See for a peculiar case, *In re Claff*, 7 Am. B. R. 128, 111 Fed. 506.

129. See p. 64 and p. 74, ante.

130. See Section Sixteen of this work.

131. Compare § 67-d; *Paxton v. Scott*, 10 Am. B. R. 80 (Neb. Sup. Ct.); *Elsbree v. Burt*, 9 Am. B. R. 87 (R. I. Sup. Ct.); *Howard v. Cunniff*, 10 Am. B. R. 71 (Mo. App.), 69 S. W. 737.

132. See § 67-f.

133. For instance, see § 1268 of the N. Y. Code of Civil Procedure; *Hussey v. Judson*, 11 Am. B. R. 521 (N. Y. City Ct., App. T.).

134. *In re Rhutassel*, 2 Am. B. R. 697, 96 Fed. 597.

135. See, generally, Section Eleven of this work.

136. See under Section Seventeen, post.



## SECTION FIFTEEN.

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### DISCHARGES, WHEN REVOKED.

§ 15. **Discharges, when Revoked.**— *a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

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**Analogous provisions:** In U. S.: Act of 1867, § 34, R. S., § 5120; Act of 1841, § 4; Act of 1800, § 34.

In Eng.: Act of 1890, § 8 (8).

**Cross references:** To the law: §§ 2 (12); 13; 14; 21-f; 29-b; 64-c.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Comparative Legislation.

Revocation of Discharges under Former Laws.

#### II. Collateral Attack.

Discharge Cannot be Collaterally Attacked.

*Jurisdiction to Revoke is Exclusive.*

#### III. Meaning of Section.

In General.

"Parties in Interest."

"Undue Laches."

"Within One Year."

"Upon a Trial."

"Obtained through the Fraud of the Bankrupt."

**III. Meaning of Section — Continued.**

"Knowledge of the Fraud \* \* \* Since the Granting of the Discharge."

"Facts did not Warrant the Discharge."  
Practice.

**IV. Effect of Revocation of Discharge.**

In General.

Meaning of § 64-c.

**I. COMPARATIVE LEGISLATION.**

**Revocation of Discharges under Former Laws.**—There is no equivalent section in the English law, though a bankrupt's discharge may be revoked in certain cases as a penalty.<sup>1</sup> Our law of 1800, in effect, permitted the impeachment of a discharge when or where pleaded on any grounds which might have been urged against it in the court of bankruptcy. The Act of 1841 provided for a like impeachment on a showing of "some fraud or a willful concealment by him of his property, \* \* \* contrary to the provisions of this act." The law of 1867, for the first time, provided for a direct proceeding to revoke. The sole ground of revocation, as under the present law, was that the discharge "was fraudulently obtained." The practice on such applications was also provided for; and the limitation was two years, instead of one.<sup>2</sup>

**II. COLLATERAL ATTACK.**

**Discharge Cannot be Collaterally Attacked.**—The decisions under the law of 1867 on this question were not entirely uniform, though the weight of authority was that a discharge once granted was not subject to attack elsewhere.<sup>3</sup> There can be little doubt that this is the rule now.<sup>4</sup> The very nature of the proceeding results in the doctrine that the granting of a discharge is an adjudication between the bankrupt and all parties duly scheduled or with notice,

1. Act of 1890, § 8 (8); General Rules, 240 (3), 244A.

2. § 34, Act of 1867, R. S., § 5120.

3. *Dusenberry v. Hoyt*, 53 N. Y. 521; *Black v. Blazo*, 117 Mass. 17; *Corey v. Ripley*, 57 Me. 69; *Commercial Bank v. Buckner*, 20 How. 108;

*In re Witkowski*, Fed. Cas. 17,920; *Stevens v. Brown*, 11 N. B. R. 568. *Contra*, *Perkins v. Gay*, 3 N. B. R. 772; *Beardsley v. Hall*, 36 Conn. 270.  
4. *In re Shaffer*, 4 Am. B. R. 728, 104 Fed. 982.

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§ 15.] Jurisdiction to Revoke is Exclusive; Meaning of Section.

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amounting to *res adjudicata* that no other court will allow to be impeached.<sup>5</sup> Besides, the present law, like its predecessor, declares that such discharge, "not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."<sup>6</sup>

*Jurisdiction to Revoke is Exclusive.*—It follows, also, under well-known canons of interpretation, that, this method of revocation being prescribed, it excludes all other methods in other courts.<sup>7</sup> It excludes, too, any other method amounting to an actual revocation, even in the court of bankruptcy. It seems, however, that such a court has still the usual jurisdiction, where there is no other remedy, to vary, recall, or annul its orders, including, of course, a discharge, if application is seasonably made and justice requires.<sup>8</sup> In actual practice, the only difference between such an annulment and a revocation proper is that, in the former, a valid discharge may subsequently be granted; while, in the latter, the determination is final, subject, of course, to appeal.

### III. MEANING OF SECTION.

**In General.**—The striking similarity between this section and § 13, both in phrasing and in purpose, should be noted. So also should the fact that the revocation of a discharge lifts the bar as to all debts, while § 17 chiefly has to do with those debts to which a discharge is never a bar.<sup>9</sup> The meaning of the various words and clauses is briefly discussed below.

**"Parties in Interest."**—This phrase is used elsewhere in the statute. It may mean more than "creditor," but usually is an equivalent. It includes only those persons whose rights would be barred by the discharge.<sup>10</sup> Only such persons can apply for a revocation.

5. *Hudson v. Bingham*, 8 N. B. R. 494, and cases there cited; *Reed v. Bullington*, 49 Miss. 223, and cases cited.

6. § 21-f.

7. *Corey v. Ripley*, ante; *Commercial Bank v. Buckner*, ante; *Nicholas v. Murray*, Fed. Cas. 10,223.

8. *In re Dupee*, Fed. Cas. 4,183; *In re Buchstein*, Fed. Cas. 2,076; *In re Dietz*, 3 Am. B. R. 316, 97 Fed. 563.

But compare *In re Rudwick*, 2 Am. B. R. 114, 93 Fed. 787. See also for time limitation, *In re Hawk*, 8 Am. B. R. 71, 114 Fed. 916.

9. See Section Seventeen, post; *In re Mussey*, 3 Am. B. R. 592, 99 Fed. 71; *In re Rhutassel*, 2 Am. B. R. 697, 97 Fed. 957.

10. Compare § 17; *In re Fowler*, Fed. Cas. 4,999.

**"Undue Laches."**—The meaning of this phrase, which, however, did not occur in the former law, is indicated by the cases decided under it, some of which are cited in the foot-notes.<sup>11</sup> Each case turns on its own facts.<sup>12</sup> It will at once be seen that these words are a limitation on those discussed in the next paragraph. *Laches* may prove a bar inside the year.

**"Within One Year."**—This is a limitation and is strictly construed.<sup>12a</sup> The year undoubtedly begins to run from the date of the order of discharge.<sup>13</sup> While an application for revocation thus cannot be made after the year has elapsed, it is thought that application to the court to vary or annul the order may be made after that time, though a court will properly refuse such an application when plainly for the purpose of avoiding this limitation.<sup>14</sup>

**"Upon a Trial."**—The right to a jury trial in bankruptcy cases is fully discussed later.<sup>15</sup> It is very doubtful whether, under the present law, an application for revocation of a discharge can be submitted to a jury.<sup>16</sup> As stated elsewhere, a hearing before the judge or a special master is a trial.<sup>17</sup> But the referee, as such, can no more hear such an application than he can one for a discharge.

**"Obtained Through the Fraud of the Bankrupt."**—These words are not essentially different from those in the former law.<sup>18</sup> Fraud is the only ground for revoking a discharge.<sup>19</sup> It would seem that this means fraud in fact, as the intentional omission of assets,<sup>20</sup> or of a creditor,<sup>21</sup> from the schedules. Thus, where the omission was due to mistake in law and the trustee was informed of the property,<sup>22</sup> or where the fraud complained of was committed years before the

11. In re Buchstein, *supra*; In re Murray et al., Fed. Cas. 9,953; In re McIntire, Fed. Cas. 8,823; In re Beck, 31 Fed. 554. See also under the present law, In re Hawk, 8 Am. B. R. 71, 114 Fed. 916; In re Upson, 10 Am. B. R. 758, 124 Fed. 980.

12. In re Oleson, 7 Am. B. R. 22, 110 Fed. 796.

12a. Text cited in Matter of Bimberg, 9 Am. B. R. 601, 121 Fed. 942.

13. In re Shaffer, *ante*. But see In re Hawk, *supra*; In re Brown, Fed. Cas. 1,983.

14. In re Dupee, *ante*.

15. See Section Nineteen of this work.

16. See p. 172, *ante*.

17. See p. 173, *ante*.

18. § 34, Act of 1867, R. S., § 5120.

19. In re Meyers, *post*; In re Shaffer, *supra*.

20. In re Meyers, 3 Am. B. R. 722, 100 Fed. 775; In re Augenstein, 16 N. B. R. 252; In re Roosa, 9 Am. B. R. 531, 119 Fed. 542.

21. Symonds v. Barnes, 6 N. B. R. 377; In re Herrick, Fed. Cas. 6,419.

22. In re Hansen, 107 Fed. 252.

bankruptcy,<sup>23</sup> revocation will not usually be decreed. It was held under the former law that pleading and proof were limited to such acts as would have been available objections to the discharge.<sup>24</sup> It is not thought, however, that this is now the law; the weight of authority is that any act which amounts to a fraud committed by the bankrupt while obtaining his discharge is sufficient.<sup>25</sup> His verified petition for discharge is so phrased as to make many acts or omissions in the bankruptcy antedating the discharge proceeding proper, frauds that may be asserted on an application of this character. On the other hand, what might have been objections to a discharge may not prove available grounds for revocation. Thus, cases are possible, though not likely, where false swearing in the proceeding may not be a fraud on creditors; refusal to obey a lawful order is usually but a contempt of court. As a rule, however, through the link of the petition for discharge, objections to discharge are, if discovered after the discharge, available in proceedings to revoke.

**"Knowledge of the Fraud \* \* \* Since the Granting of the Discharge."**—This is essential<sup>26</sup> and, therefore, jurisdictional. Knowledge of the petitioner's attorney has been held to be his knowledge, and revocation refused where it antedates the discharge.<sup>27</sup> Similar words will be found in the law of 1867.<sup>28</sup> The purpose of this limitation is to restrict this process to those frauds which shall be discovered after the discharge. Otherwise, an application for revocation would be equivalent to a retrial before appeal.

**"Facts did not Warrant the Discharge."**—The applicant must also plead and prove that the facts did not warrant the discharge.<sup>28a</sup> These words are new. In actual practice, they can mean little

23. In re Hoover, 5 Am. B. R. 247, 105 Fed. 354; In re Corwin, Fed. Cas. 3,259.

24. This was due to the phrasing of § 34 of that law, which see. Note also Ashley v. Robinson, 29 Ala. 112; Poillon v. Lawrence, 77 N. Y. 207, 214.

25. For instance, Batchelder v. Low, 43 Vt. 662; Alston v. Robinett, 37 Tex. 56.

26. Note In re Marrionneaux, Fed. Cas. 9,088.

27. In re Douglass, 11 Fed. 403.

28. See § 34, Act of 1867.

28a. In re Toothaker Bros., 12 Am. B. R. 99, 128 Fed. 187, holding that facts need only be set forth sufficient to have warranted a refusal of discharge; it is not necessary to allege as a conclusion of law that the "facts did not warrant the discharge."

more than what is expressed in "obtained through the fraud of the bankrupt."

**Practice.**—Here the law is silent; so are the rules and forms. The application must be made to the judge. He will usually refer it to the special master.<sup>29</sup> If for revocation, it should be by petition. What has been said touching objections to a discharge should be read in this connection.<sup>30</sup> The grounds on which the application rests should be strictly pleaded.<sup>31</sup> Amendments will sometimes be allowed. Reasonable notice should be given the bankrupt, and, it is suggested, should be by personal service; under the analogies of the statute, also, the usual ten-day notice to creditors by mail would seem wise.<sup>32</sup> The practice on the hearing and afterwards does not differ from that on a contested discharge.<sup>33</sup> But here the moving creditor, it would seem, should conform more strictly to his pleadings. The successful party may recover costs.<sup>34</sup>

#### IV. EFFECT OF REVOCATION OF DISCHARGE.

**In General.**—The revocation of a discharge makes the discharge a nullity, excepting as to those who have acted on the faith of it while operative.

**Meaning of § 64-c.**—Here Section Thirteen should be consulted.<sup>35</sup> That after-acquired property may be administered in the pending bankruptcy proceeding is one of the anomalies of the statute.<sup>36</sup> If the trustee is still undischarged, title to property acquired up to the date of the order revoking vests in the trustee, who must thereupon distribute as provided by this section; if there be no trustee, the case may be reopened and one appointed in the usual way.<sup>37</sup> If there be a surplus, it can be paid only to those creditors in the original proceeding whose claims were filed within a year from the beginning of that proceeding.<sup>38</sup>

29. In re Meyers, 3 Am. B. R. 722, 100 Fed. 775. See, for practice, under Section Fourteen, p. 172, ante.

30. See pp. 170-175, ante.

31. In re McIntire, Fed. Cas. 8,823; Lathrop v. Stewart, 6 McLean, 630.

32. Compare § 58, and see under Section Fourteen, ante.

33. See pp. 170-175, ante.

34. In re Holgate, Fed. Cas. 6,601.

35. See pp. 161-163, ante.

36. Compare subdivision c in Section Sixty-four, post.

37. See § 2 (8).

38. In re Shaffer, 4 Am. B. R. 728, 104 Fed. 982.

## SECTION SIXTEEN.

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### CO-DEBTORS OF BANKRUPTS.

§ 16. **Co-Debtors of Bankrupts.**— *a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

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**Analogous provisions:** In U. S.: Act of 1867, § 33, R. S., § 5118; Act of 1841, § 4; Act of 1800, § 34.

In Eng.: Act of 1883, § 30 (4).

**Cross references:** To the law: §§ 5; 14-b; 15; 17; 29-b; 57-i; 63.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Scope of Section.

Declaratory of the Law.

Effect of Creditors' Acts.

Whether Discharged Co-debtor a Necessary Party.

#### II. Joint Debts.

Of Partners.

Of Co-debtors.

#### III. Surety Debts.

Of Indorsers.

Of Obligor on bonds.

*Attachment Bonds.*

*Appeal, Replevin, and Jail Bonds.*

Of Directors of Corporations.

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### I. SCOPE OF SECTION.

**Declaratory of the Law.**— This section is merely declaratory of a general principle of law, and has not yet been much discussed

by the courts. It results from two well-settled doctrines: (1) that a discharge in bankruptcy affects only the personal liability of the debtor, and not that liability as to other persons,<sup>1</sup> (2) and that such a discharge is by operation of law and not by consent.<sup>2</sup> It was well settled under the former law that the principle thus stated applied only to a discharge in bankruptcy,<sup>3</sup> and not to any act of the parties affecting a release;<sup>4</sup> also that, the creditor having still the right to collect from any other person liable on the debt, a pending suit against such other is not affected by the discharge,<sup>5</sup> nor is the right to execution or supplementary proceedings against that other.<sup>6</sup> The reported cases under that law are thus as applicable now as then.<sup>7</sup>

**Effect of Creditors' Acts.**—Thus, it makes no difference whether the creditor proves his claim and gets his dividend.<sup>8</sup> The co-debtor or surety may protect himself by proving the claim, and cannot complain if the debtor does not.<sup>9</sup> So also when the creditor in effect consents to the discharge—as when he has knowledge of a sufficient objection and does not plead it—the discharge being by operation of law only, the liability of the surety remains.<sup>10</sup>

**Whether Discharged Co-debtor is a Necessary Party.**—If one of two or more joint debtors is discharged, and suit is brought on the joint debt, it has been a mooted question whether the discharged joint debtor was a necessary party.<sup>11</sup> Since he can unquestionably be made a party, his discharge being only available in bar, the safer practice is to join him as a defendant.

## II. JOINT DEBTS.

**Of Partners.**—This subject is also discussed elsewhere.<sup>12</sup> The words of the section express the rule of law applicable to dis-

1. *Moyer v. Dewey*, 103 U. S. 301.

2. *Mason v. Bancroft*, 1 Abb. N. C. 415; *Ex parte Jacobs*, 44 L. J. B. 34.

3. Compare *In re McDonald*, Fed. Cas. 8753.

4. *Brown v. Carr*, 7 Bing. 508; *Sigourney v. Williams*, 1 Gray, 623.

5. *Lewis v. U. S.*, 92 U. S. 618; *In re Levy*, Fed. Cas. 8,297; *Payne v. Albe*, 7 Bush (Ky.), 244; *Linn v. Hamilton*, 34 N. J. 305.

6. *In re De Long*, 1 Am. B. R. 66; *Penny v. Taylor*, Fed. Cas. 10,957.

7. See Cent. Dig., Vol. 6, "Bankruptcy," §§ 782-786.

8. *Clopton v. Spratt*, 52 Miss. 251.

9. See § 57-i.

10. *In re McDonald*, supra; *Ex parte James*, supra.

11. *Camp v. Gifford*, 7 Hill, 169. Contra, *Jenks v. Opp*, 43 Ind. 108; *Dorn v. O'Neale*, 6 Nev. 155.

12. See under Sections Five and Seventeen of this work.



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 § 16.] Surety Debts; Indorsers; Obligors on Bonds.
 

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charges granted to members of firms as distinguished from partnership discharges. The analogous clause of the former law was held to imply that an individual partner was entitled to a discharge from partnership debts.<sup>13</sup> The same inference follows from the words of the present section.<sup>14</sup>

**Of Co-debtors.**—A like rule applies here as where two parties make a note jointly, or are joint obligors on a bond. But, where one of two or more joint obligors has been discharged, the others cannot, it seems, insist on contribution, though this doctrine may well be questioned.<sup>15</sup>

### III. SURETY DEBTS.

**Of Indorsers.**—Under the principle stated, the discharge of the maker of a note does not affect the indorser in any way; the holder may proceed and collect the entire debt from him.<sup>16</sup> Familiar principles, however, exonerate the indorser of a demand note, the holder of which is guilty of undue *laches* in presentment.<sup>17</sup>

**Of Obligors on Bonds.**—The rule here is the same: The obligor continues liable though the principal or a co-obligor be discharged.<sup>18</sup> This is peculiarly so where the bond runs to the people, bankruptcy not, as a rule, affecting such liabilities.<sup>19</sup> But cases constituting exceptions to this doctrine are numerous.

**Attachment Bonds.**—Under the former law, the decisions on this point were about equally divided.<sup>20</sup> Such bonds being as a rule conditioned to pay a sum of money if the suit should go against the principal, the liability could not arise until the judgment was granted. The bankruptcy intervening, the principal could thus stay the entry of the judgment, and later plead his discharge in

13. In re Downing, Fed. Cas. 4,044. See also, for effect of English discharge on individual liability, Ex parte Hammond, L. R., 16 Eq. 614.

14. Compare under Section Five, ante.

15. Tobias v. Rogers, 13 N. Y. 59. But compare Miller v. Gillespie, 59 Mo. 220.

16. National Bank of South Reading v. Sawyer, 3 N. B. N. Rep. 226; Smith v. Wheeler, 55 App. Div. (N. Y.) 170; King v. Central Bank, 6 Ga. 257; Tiernan Exrs. v. Woodruff, 5 McLean, 350; Guild v. Butler, 16 N. B. R. 347.

17. In re Crawford, Fed. Cas. 3,364.

18. Abendroth v. Van Dolsen, 131 U. S. 66; In re Stevens, Fed. Cas. 13,393; In re De Long, 1 Am. B. R. 66. And see as to liability of guarantor of rent under a lease terminated by an adjudication in bankruptcy, Witthaus v. Zimmerman, 11 Am. B. R. 314, 91 App. Div. (N. Y.) 202.

19. U. S. v. Knight, 14 Pet. 315; U. S. v. Herron, 20 Wall. 251.

20. See Holyoke v. Adams, 1 Hun (N. Y.), 223, and other cases, post.

bar, and the liability of the sureties thus would never accrue. In these circumstances, the New York rule, resting on the doctrine that the law of 1867 did not dissolve the lien of the attachment and that the bond was a substituted security, held that the plaintiff should be allowed to proceed to judgment, which, if granted, fixed the liability of the sureties;<sup>21</sup> while the Massachusetts rule, denying the fiction of substituted security and holding that such a bond was a mere personal liability which did not accrue until judgment in the principal action, by allowing a stay or a plea in bar, relieved the sureties.<sup>22</sup> The latter seems to have been the view of the Supreme Court, though its decision is not authoritative.<sup>23</sup> Indeed, the New York doctrine that, not the bankruptcy, but the giving of the bond, dissolves the attachment, being, it is thought, abrogated (provided the attachment was within four months of the filing of the petition) by the clear intendment of § 67-f of the present statute, the rule just stated can no longer be considered the law even in that State.<sup>24</sup> Where, then, the attachment is within the four months' period, the sureties are relieved, not because of the discharge of the debtor, but because his bankruptcy destroys the lien against the validity of which they were obligated.

*Appeal, Replevin, and Jail Bonds.*—Here, if the law of the State does not permit the discharge to be pleaded in the appellate court, the discharge of the principal does not relieve his surety. If it may be pleaded in such court, no final judgment being possible against the principal, the surety is relieved.<sup>25</sup> Replevin bonds being merely for the return of a chattel in kind or value, and the trustee having succeeded to the bankrupt's interest, the discharge cannot be pleaded in bar; the liability of the surety may thusulti-

21. *McCombs v. Allen*, 18 Hun (N. Y.), 190; affirmed, 82 N. Y. 114. See also *In re Albrecht*, Fed. Cas. 145; *Zoller v. Janvrin*, 49 N. H. 114.

22. *Hamilton v. Bryant*, 114 Mass. 543; *Braley v. Boomer*, 116 Mass. 527; *Johnson v. Collins*, 117 Mass. 343. See also *Rosenthal v. Nove*, 56 N. E. 884.

23. *Wolf v. Stix*, 99 U. S. 1; *Hill v. Harding*, 107 U. S. 631, is a case where the attachment was before the interdicted period.

24. Compare under Section Sixty-seven for effect of an attachment more than four months before the bankruptcy, but the judgment on which is entered in that period; and also generally on the dissolution of attachment liens by an adjudication in bankruptcy.

25. *Knapp v. Anderson*, 71 N. Y. 466; *Flagg v. Tyler*, 6 Mass. 32; *Hall v. Fowler*, 6 Hill, 630; *Odell v. Wooten*, 38 Ga. 225. And see *Goyer Co. v. Jones*, 8 Am. B. R. 437.

## § 16.1 Effect of Discharge in Liabilities of Directors of Corporations.

mately be fixed, and the discharge does not release it.<sup>26</sup> In jail bonds, the rule is well settled that, if there has been no breach of the conditions before discharge granted, the sureties will be released, but, if there has, then a liability has accrued which may still be enforced *pro tanto* against them.<sup>27</sup> A like doctrine saves to those interested the liabilities of sureties on administrator's and guardian's bonds, and the like.<sup>28</sup> It is thought, however, that a court of bankruptcy will stay proceedings in most of the suits in which any of the bonds mentioned in this paragraph have been given, at least until the creditor has had reasonable opportunity to ascertain and collect his dividend; this that he may apply the same in reduction of the amount due from the sureties before entering up judgment against them.<sup>29</sup>

**Of Directors of Corporations.**—Directors are sureties in a qualified sense only. Being such, they are, however, within the intentment of this section of the law, and are not released by the discharge of their corporation from any liability to its creditors given by law.<sup>30</sup>

<sup>26</sup> Flagg v. Tyler, 6 Mass. 32. Compare also Pinkard v. Willis, 57 S. W. 891.

<sup>27</sup> Olcott v. Lilly, 4 Johns. (N. Y.) 409; Richardson v. McIntyre, 4 Wash. C. C. 412; Bennett v. Alexander, 1 Cranch C. C. 90; Claffin v. Coogan, 48 N. H. 411.

<sup>28</sup> Miller v. Gillespie, 59 Mo. 220; Jones v. Knox, 8 N. B. R. 559; Reitz v. People, 16 N. B. R. 10; Jones v. Russell, 44 Ga. 460. But see Mayor

v. Walker, 11 N. B. R. 478. Compare also Baer v. Grell, 6 Am. B. R. 428; Goding v. Rosenthal, 61 N. E. 222.

<sup>29</sup> In re Martin, 5 Am. B. R. 423, 105 Fed. 753.

<sup>30</sup> In re Marshall Paper Co., 2 Am. B. R. 653, 95 Fed. 419; s. c. on appeal, 4 Am. B. R. 468, 102 Fed. 872. Compare § 4-b as amended by the Act of 1903.

## SECTION SEVENTEEN.

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### DEBTS NOT AFFECTED BY A DISCHARGE.

§ 17. Debts not Affected by a Discharge.— *a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are<sup>1</sup> *liabilities\** for<sup>2</sup> obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, *or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation*;\* (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

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**Analogous provisions:** In U. S.: *As to discharge being a release*, Act of 1867, § 34, R. S., § 5119; Act of 1841, § 4; Act of 1800, § 34; *As to debts not affected by a discharge*, Act of 1867, § 33, R. S., § 5117; Act of 1841, § 1; *As to effect on taxes*, Act of 1867, § 28, R. S., § 5101; Act of 1800, § 62.

**In Eng.:** *As to discharge being a release*, Act of 1883, § 30 (2); *As to debts not affected by a discharge*, Act of 1883, § 30 (1); Act of 1890, § 10.

**Cross references:** To the law: §§ 1 (15); 12; 13; 14-b; 15; 16; 21-f; 29-b; 63; 64-a.

**To the General Orders:** None.

**To the Forms:** None.

1. Here the words "judgments in actions," in the original law were stricken out by the amendatory act of 1903 and the word "liabilities" substituted therefor.

2. Here the words "frauds, or" were stricken out by the amendatory act of 1903.

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\*Amendments of 1903 in italics.

## SYNOPSIS OF SECTION.

**I. Comparative Legislation and Scope of Section.**

Excepted Debts in England.

Under Our Law of 1867.

Scope of Section.

Determining Effect of Discharge.

**II. What Debts are Dischargeable.**

In General.

As Dependent on the Person Claiming.

As Dependent on the Nature of the Liability.

*Liabilities for Conversion.**Liabilities for Breach of Promise of Marriage.***III. What Debts are not Dischargeable.**

Subd. (1). Liabilities to the State.

Subd. (2). Other Liabilities.

*Meaning of the Senate Amendment.**"For Obtaining Property on False Pretenses or False Representations."**"For Willful and Malicious Injuries to the Person or Property of Another."**"For Alimony Due or to Become Due."**"For Maintenance or Support of Wife or Child."**"For Seduction of an Unmarried Female."**"For Criminal Conversation."**The Amendatory Act of 1903.**Other Willful and Malicious Injuries.*

Subd. (3). Those not Scheduled.

Subd. (4). Fiduciary Debts.

*Who are Fiduciary Debtors.***IV. Pleading Discharge.**

In General.

*As Dependent on Time.***V. Revival of Discharged Debt by New Promise.**

Effect and How Accomplished.

**I. COMPARATIVE LEGISLATION AND SCOPE OF SECTION.**

**Excepted Debts in England.**—The English Act of 1883 provided broadly that all provable debts shall be released by the discharge, except, in substance, (a) a recognizance, or (b) any debt to the

Crown or for an offense or any liability on a bail bond given for the appearance of a person charged with an offense against a statute relating to the public revenues, or (c) any debt or liability incurred by means of fraud or fraudulent breach of trust. The amendatory act of 1890 excepted also any liability under a judgment for seduction, support, or criminal conversation. Save in its silence as to debts not scheduled, therefore, the English statute is not materially different from ours. Useful precedents will be found in the reported cases under the English law.<sup>3</sup>

**Under Our Law of 1867.**—The differences between the analogous clause in the former law and that now under discussion will appear in subsequent paragraphs. The effect of a discharge on the liability of co-debtors has been considered in the previous Section. Aside from this, the former law<sup>4</sup> excepted from the discharge only (a) fraudulent debts and (b) fiduciary debts. Fiduciary debts only were excepted by the law of 1841, though a discharge could be impeached for fraud or willful concealment of property wherever pleaded.<sup>5</sup> There were no excepted classes, save debts to the United States, recognized by the law of 1800.<sup>6</sup> The tendency is clearly to increase the exceptions; this tendency keeping pace with the widening out of the meaning of the word "debt." In both these directions, the present law, as amended in 1903, has gone further than any other bankruptcy law.

**Scope of Section.**—This Section and Section Fourteen, on "Discharges," and Section Sixty-three, on "Provable Debts," should be read together.<sup>6a</sup> It declares the effect of the discharge, by prescribing that only provable debts shall be released, and then that even certain provable debts shall be excepted. It follows, therefore, that dividends may be paid on a debt, and yet it be not affected by a discharge. In this connection, the practitioner should also bear in mind the following familiar rules: The discharge is available as a plea in bar in a suit on the debt, no more; and, therefore, does not affect vested liens on the bankrupt's property. Nor is it material whether the debt was proved; if it could have been proved, it will be discharged.<sup>7</sup> But, the present law

3. See Baldwin on Bankruptcy, 8th ed., pp. 608-612, and cases cited.

4. Act of 1867, § 33, R. S., § 5117.

5. Act of 1841, §§ 1, 4.

6. Act of 1800, § 62.

6a. Crawford v. Burke, 12 Am. B. R. 654.

7. See Dean v. Justices, 2 Am. B. R. 163; In re Stansfield, Fed. Cas. 13,294; Lamb v. Brown, Fed. Cas. 8,011.

## § 17.1 Determining Effect of Discharge; What Debts are Dischargeable.

containing no provision that the proving of a debt shall constitute a waiver of other remedies, the creditor loses no remedy by proving; and, unless a discharge is granted and pleaded, a subsequent suit can be maintained.<sup>8</sup>

**Determining Effect of Discharge.**—The court in which the debt is proceeded on is the only proper forum to determine whether a discharge releases such debt.<sup>9</sup> This was not so under the former law. Nor have the courts under the present, always recognized this distinction between the two statutes.<sup>10</sup> Thus, a discharge should be granted even if the only debt scheduled is clearly not dischargeable.<sup>11</sup> But the federal courts are often asked to pass upon the effect of discharges not yet granted, as where application is made to stay a suit on a debt to which, it is claimed, the discharge will prove a bar. In so doing, such court will usually determine the question in accordance with the law and decisions of the State in which the debt originated, though, if that law conflicts with the bankruptcy law, the latter will control.<sup>12</sup> If the debt has been reduced to judgment, the federal court, while not bound by the recitals of the judgment, will usually determine the nature of the action from the record of the state court,<sup>13</sup> and stay or refuse a stay accordingly.<sup>14</sup>

## II. WHAT DEBTS ARE DISCHARGEABLE.

**In General.**—Only provable debts are dischargeable.<sup>15</sup> Thus, even a debt scheduled in a bankruptcy under the former law, but kept alive by a subsequent judgment, will, because provable, be

8. *Dingee v. Becker*, Fed. Cas. 3,919; *Whitney v. Crafts*, 10 Mass. 23.

9. *In re Blumberg*, 1 Am. B. R. 633, 94 Fed. 476; *In re Rhutassel*, 2 Am. B. R. 697, 96 Fed. 597; *In re Thomas*, 1 Am. B. R. 515; *In re Mussey*, 3 Am. B. R. 592.

10. Compare *Audubon v. Shufeldt*, 181 U. S. 575, 5 Am. B. R. 829.

11. *In re McCarthy*, 7 Am. B. R. 40, 111 Fed. 151; *In re Tinker*, 3 Am. B. R. 580, 99 Fed. 79. Contra, *In re Maples*, 5 Am. B. R. 426, 105 Fed. 919.

12. *Woolsey v. Cade*, 15 N. B. R. 238.

13. *Knott v. Putnam*, 6 Am. B. R.

80, 107 Fed. 907, and many cases, post, in this Section. Compare *Burnham v. Pidcock*, 5 Am. B. R. 590; *In re Bullis*, 7 Am. B. R. 238; *Barnes Mfg. Co. v. Norden*, 7 Am. B. R. 553; *Berry v. Jackson*, 8 Am. B. R. 485; *In re Patterson*, Fed. Cas. 10,817; *In re Whitehouse*, Fed. Cas. 17,564; *Warner v. Cronkhite*, Fed. Cas. 17,180.

14. For additional discussion of effect of discharge, see under "Pleading Discharge," pp. 202, 203, post.

15. See § 63. For interesting case see *Graham v. Richerson*, 8 Am. B. R. 700.

released.<sup>16</sup> While that the debtor's sole purpose was to discharge a particular debt will not affect the validity of the discharge when obtained.<sup>17</sup> But, since only provable debts are discharged, none post-dating the petition in bankruptcy are affected by the discharge.<sup>18</sup> Broad and ancient principles also exclude obligations to the state or sovereign, and this, too, whether specially excepted by the law or not; thus, fines imposed as penalties for crimes,<sup>19</sup> the obligation of the father of a bastard child to support it and protect the community from that duty,<sup>20</sup> and, of course, all debts not taxes (which are expressly excepted) due the United States,<sup>21</sup> or a State so long as the latter acts in a sovereign capacity.<sup>22</sup> This subject is also discussed under Section Sixty-three, *post*, which see.

**As Dependent on the Person Claiming.**—While, as a rule, the debt of every creditor entitled to prove a claim is dischargeable, yet the effect of such discharge is sometimes limited by citizenship or the claimant's relation to other persons or business entities. Thus, the debt of an alien, whether resident or not, is discharged,<sup>23</sup> though the discharge cannot be pleaded in a foreign court. On the other hand, the debt of an alien bankrupt discharged by the courts of his country may still be sued on here.<sup>24</sup> This is contrary to the English rule;<sup>25</sup> and a bankruptcy agreement between the two countries has often been discussed. If the bankrupt, by the laws of his State, is liable for his wife's debts, as for necessities, his discharge will release them.<sup>26</sup> If, on the other hand,

16. *In re Herrman*, 4 Am. B. R. 139, 102 Fed. 753; affirmed, 106 Fed. 987. Compare *In re Claff*, 7 Am. B. R. 128, 111 Fed. 506; *Dean v. Justices*, ante.

17. *Finnegan v. Hall*, 6 Am. B. R. 648.

18. *In re Burka*, 5 Am. B. R. 12, 104 Fed. 326; *In re Marcus*, 5 Am. B. R. 19, 104 Fed. 331; affirmed, s. c., 5 Am. B. R. 365, 105 Fed. 907.

19. *In re Moore*, 6 Am. B. R. 590, 111 Fed. 145. Contra, *In re Alderson*, 3 Am. B. R. 544, 98 Fed. 588. Compare also *People v. Spaulding*, 10 Paige (N. Y.), 284, and subsequent appeals, 7 Hill, 301, 4 How. (U. S.) 21.

20. *In re Baker*, 3 Am. B. R. 101, 96 Fed. 964; *Hawes v. Cooksey*, 13 Ohio, 242.

21. *United States v. Herron*, 20 Wall. 251, and cases cited.

22. *State v. Shelton*, 47 Conn. 400; *Commonwealth v. Hutchinson*, 10 Pa. St. 466.

23. *Pattison v. Wilbur*, 10 R. I. 448; *Ring v. Eickerson*, 2 McCrary, 259. Note also *In re Clisdell*, 2 Am. B. R. 424.

24. *Zarega's Case*, Fed. Cas. 18,204; *In re Shepard*, Fed. Cas. 12,753.

25. *Potter v. Brown*, 5 East, 124; *Cook's Bankruptcy Law*, 520.

26. *Vanderhayden v. Mallory*, 1 N. Y. 452.



## § 17.] Dischargeability as Dependent on the Nature of the Liability.

she is alone responsible, his discharge will not affect her liability.<sup>27</sup> Where the bankrupt is a partner, the effect of his individual discharge on his partnership debts depends on circumstances.<sup>28</sup> The liability of the director of a discharged corporation has already been discussed.<sup>29</sup> For the dischargeability of debts already barred by the statute of limitations, and those purely contingent at the time of the bankruptcy, see under Section Sixty-three, *post*.

**As Dependent on the Nature of the Liability.**—Under previous laws, liabilities for torts were not discharged unless in judgment,<sup>30</sup> and this though liquidation was not essential to bring a debt within the excepted classes. The use of the word “judgment” in the present law as passed emphasized this rule. It is surely still the law where the wrongs relied on are within the terms of subdivision (2) of § 17.<sup>31</sup> When, however, the tort grows out of or is the result of consent or a contract, on broad principles and irrespective of the amendment, it will, it is thought, even if not in judgment, be discharged.<sup>32</sup> A stockholder’s liability for the debts of a corporation declared by a decree which established the amount chargeable is a provable debt and is released by his discharge.<sup>32a</sup>

**Liabilities for Conversion.**—It was doubted under the former bankruptcy laws whether such liabilities before judgment were released.<sup>33</sup> On principle, the original relation being a contractual one, as, for instance, that between principal and agent, it would seem that a discharge would be a release. Certainly under the present law, it having been long settled that the liability of the converting bankrupt is not within the terms of § 17-a (2),<sup>34</sup> and

27. *Mobley v. Cureton*, 6 S. C. 49; *Alling v. Egan*, 11 Rob. (La.) 244.

28. See Sections Four and Fourteen, *ante*. Compare *In re Schulz*, 6 Am. B. R. 91, 109 Fed. 264.

29. See Sections Four, Fourteen, and Sixteen, *ante*. Compare *In re Marshall Paper Co.*, 2 Am. B. R. 653, 95 Fed. 419; *s. c.* affirmed, 4 Am. B. R. 468, 102 Fed. 872.

30. *In re Book*, Fed. Cas. 1,637; *In re Wiggers*, Fed. Cas. 17,623; *Hays v. Ford*, 55 Ind. 52; *Comstock v. Grout*, 17 Vt. 512.

31. Thus see *Hun v. Cary*, 82 N. Y. 65; *Williamson v. Dickens*, 27 N. C. 259.

32. Thus, where the liability is for conversion, breach of promise of marriage, or seduction on the ground of loss of services, see subsequent paragraphs. On this subject, generally, see Section Sixty-three, *post*.  
32a. *Dight v. Chapman*, 12 Am. B. R. 743 (Oreg.).

33. *Chapman v. Forsyth*, 2 How. 202; *Hayman v. Pond*, 48 Mass. 328. *Contra*, *Johnson v. Worden*, 47 Vt. 457; *Treadwell v. Holloway*, 46 Cal. 547; *Meador v. Sharpe*, 54 Ga. 125. Compare also *Cole v. Roach*, 37 Tex. 413.

34. *Hennequin v. Clews*, 111 U. S. 676, affirming 77 N. Y. 427. Compare *Lawrence v. Harrington*, 122 N. Y. 408.

the claim being provable in bankruptcy, there can be little doubt. There is probably none since the striking out of the word "frauds" by the Senate in its revision of the Ray amendatory bill. Indeed, the courts have already established this doctrine so firmly as to make it one of the few settled questions under the law.<sup>35</sup> The change from "judgments" to "liabilities" has affected the doctrine only to fix it more firmly. Thus, dischargeability will be decreed of all cases, such as those of agents, brokers, factors, auctioneers, conditional vendees, and the like, where there is neither a technical trust in the inception of the contractual relation nor moral turpitude in the breach of it; and cases *contra* under the former laws are no longer reliable.<sup>36</sup>

*Liabilities for Breach of Promise of Marriage.*—Such liabilities are dischargeable in bankruptcy. The cases thus far are uniform,<sup>37</sup> even, it has been held, where seduction accompanies breach of promise.<sup>38</sup>

### III. WHAT DEBTS ARE NOT DISCHARGEABLE.

**Subd. (1). Liabilities to the State.**—This follows from the doctrine that the liabilities to the sovereign will not be affected, unless he by express words extends the provisions of a statute to himself.<sup>39</sup> Indeed, it is thought that taxes would be excepted from the general dischargeability of provable debts, even were the statute silent. There is hardly enough in § 64-a, giving them priority of payment, to warrant the claim that the sovereign intended to waive his exemption here. Besides, the words used in § 63-a seem to take taxes out of the class known as "provable debts," and thus they could not be discharged in any event. Local assessments are, of course, "taxes" in the sense here used, so long as they are levied by one of the governmental entities indicated.<sup>40</sup>

35. *In re Basch*, 3 Am. B. R. 235, 97 Fed. 761; *Burnham v. Pidcock*, 5 Am. B. R. 42; s. c. on appeal, 5 Am. B. R. 590; *Bryant v. Kinyon*, 6 Am. B. R. 237; *Bracken v. Milner*, 5 Am. B. R. 23, 104 Fed. 522; *In re Benedict*, 8 Am. B. R. 463; *Watertown v. Hall*, 7 Am. B. R. 716; *Gee v. Gee*, 7 Am. B. R. 500; *Cushman v. Arkell*, 72 N. Y. Supp. 555.

36. As, for instance, *Mayor v. Walker*, 11 N. B. R. 478.

37. *In re McCauley*, 4 Am. B. R. 122; *In re Fife*, 6 Am. B. R. 258, 109

Fed. 880; *In re Brumbaugh*, 12 Am. B. R. 204, 128 Fed. 971. Compare *In re Sidle*, Fed. Cas. 12,844.

38. *Disler v. McCauley*, 7 Am. B. R. 142, reversing s. c., 6 Am. B. R. 491; *Finnegan v. Hall*, 6 Am. B. R. 648.

39. See *In re Baker*, ante, and cases cited.

40. *In re Ott*, 2 Am. B. R. 637, 95 Fed. 274. See also Report of Ex. Com. of National Assn. of Referees in Bankruptcy, published March, 1900, p. 19.

§ 17.]

Meaning of Subd. (2), as Amended in 1903.

**Subd. (2). Other Liabilities.**—Here some important changes have been made by the amendatory act of 1903. The most vital is the substitution of the word “liabilities” for the words “judgments in actions” at the beginning of this subdivision. This is a substantial return to the phrasing used in the former law,<sup>41</sup> departed from, it is thought, by the framers of the present statute because of uncertainty whether the word “debt” there used included a “judgment.” This doubt now being removed,<sup>42</sup> the unwisdom of the change made by the original statute becomes apparent.<sup>43</sup> To be sure, it will stimulate litigation, but no bankruptcy law should free debtors of fraudulent liabilities or moral duties, merely because a court has not measured them up in terms of dollars; the use of the phrase “judgments in actions” made this more than likely. The words in the English law are, as to fraudulent and fiduciary obligations, “debt or liability”<sup>44</sup> (the latter of which words is carefully defined<sup>45</sup>), and as to alimony and affiliation obligations, “judgment.”<sup>46</sup> The distinction thus made between moral duties, which must be liquidated, and debts for fraud, which need not be, is narrow and unwise; a bankrupt who is also a moral delinquent should not complain if he is harassed by suits to enforce duties. It is thought, therefore, that the opening of the door accomplished by the amendatory act of 1903 will prove the part of wisdom. It will, at any rate, put an end to the elasticity of construction evidenced by those cases which perforce have already overlooked the literal meaning of “judgment” and construed it to mean “liability.”<sup>47</sup>

*Meaning of the Senate Amendment.*—When the Ray amendatory bill reached the Senate, that body struck from the original law the word “frauds.” Thus only those liabilities strictly within sub-

41. § 33, R. S., § 5117.

42. *Boynton v. Ball*, 121 U. S. 457. Compare also *In re Pinkel*, 1 Am. B. R. 333.

43. Thus, note the unwillingness of the courts in the cases set out in the foot-notes, post, in this Section, to construe the words “judgments in actions” strictly, and observe the confusion and delays and, in some cases, denials of justice, which would result, if bankruptcy proceedings must be halted while the holder of one out of perhaps a hundred liabilities proceeds to liquidate his claim and thus intrench himself against a discharge.

44. Act of 1883, § 30 (1).

45. *Id.*, § 37 (8).

46. Act of 1890, § 10.

47. *In re Sullivan*, 2 Am. B. R. 30; *In re Lewensohn*, 3 Am. B. R. 594, 99 Fed. 73; *In re Cole*, 5 Am. B. R. 780, 106 Fed. 837; *Smith & Wallace Co. v. Lambert*, 11 Am. B. R. 252 (N. J. Law), holding that the words “judgments in actions,” as used in the act before amendment, refer to judgments exclusively and not to mere debts. Compare also *In re Rhutassel*, 2 Am. B. R. 697, 96 Fed. 597; also *Morse v. Kaufman*, 7 Am. B. R. 549.

"For Obtaining Property by False Pretenses," etc.

[§ 17.]

division (2) are now not affected by a discharge. As, however, the latter constitute practically all of the important bankruptcy frauds, the law as it existed prior to this change is considered here. The fraud meant by the original law and doubtless implied by the amended subdivision is a fraud in fact involving moral turpitude or intentional wrong.<sup>48</sup> The effect of this doctrine on debts grounded in conversion has already been noted. As to what is and what is not fraud, each case turns on its own facts.<sup>49</sup> When a judgment has been entered, the record considered as a whole will determine whether the debt is in fraud.<sup>50</sup> Fraudulent liabilities *per se* should be sharply distinguished from fiduciary liabilities, discussed later; though the latter class of liabilities always involves fraud. Under the former law, it was held that the fraud must exist at the inception of the debt.<sup>51</sup> Though the words there were "created by the fraud," the same doctrine is probably applicable now, provided the liability is within subdivision (2). Proving such a claim in the bankruptcy proceeding does not amount to a waiver of the exception.<sup>52</sup>

"*For Obtaining Property by False Pretenses or False Representations.*"—This clause will usually be available where the sale of goods on credit is brought about by false statements,<sup>53</sup> and cases arising under the new objection to discharge, based on the giving of materially false statements in writing, will be found valuable.<sup>54</sup> It must appear, however, that such representations were knowingly and fraudulently made,<sup>55</sup> and that they were relied on by the other party. A fraudulent representation by one partner will by law be

48. *Neal v. Clark*, 95 U. S. 704; *Hennequin v. Clews*, ante; *Strang v. Bradner*, 114 U. S. 555; *Noble v. Hammond*, 129 U. S. 65; *In re Blumberg*, 1 Am. B. R. 633, 94 Fed. 476; *Western Union, etc., Co. v. Hurd*, 8 Am. B. R. 633, 116 Fed. 442.

49. *In re Rhutassel*, supra; *In re Bullis*, 7 Am. B. R. 238; *Culver v. Torrey*, 69 N. Y. S. 919; *In re Lieber*, 3 Am. B. R. 217; *Collins v. McWalters*, 6 Am. B. R. 593; *Taylor v. Farmer*, 81 Ky. 458; *Sheldon v. Clews*, 13 Abb. N. C. (N. Y.) 40; *Classen v. Schoenemann*, 80 Ill. 304.

50. *Hangadine - McKittrich Dry Goods Co. v. Hudson*, 6 Am. B. R. 657, 111 Fed. 361; *In re Bullis*, supra;

*In re Arkell*, 6 Am. B. R. 650. See also, for interesting cases, *Barnes Mfg. Co. v. Norden*, 7 Am. B. R. 553; *Berry v. Jackson*, 8 Am. B. R. 485; *Stevens v. Meyers*, 8 Am. B. R. 496.

51. *United States v. The Rob Roy*, Fed. Cas. 16,179; *Brown v. Broach*, 52 Miss. 536.

52. *Frey v. Torrey*, 8 Am. B. R. 196, affirming s. c., 6 Am. B. R. 448.

53. *Ames v. Moir*, 138 U. S. 306; *In re Alsberg*, Fed. Cas. 261; *Broadnax v. Bradford*, 50 Ala. 270; *Forsyth v. Vehmeyer*, 177 U. S. 177.

54. See pp. 183-186, ante.

55. *Allen v. Hickling*, 11 Ill. App. 549.

imputed to the others, and the debt as to them will not, therefore, be discharged.<sup>56</sup>

"*For Willful and Malicious Injuries to the Person or Property of Another.*"—Here subdivision (2) stopped, prior to the amendatory act of 1903. Under it, much doubt arose as to whether certain judgments founded on moral delinquencies were dischargeable. The conflict concerning the effect of a judgment for breach of promise of marriage accompanied by seduction is an instance.<sup>57</sup> A judgment obtained for the alienation of a husband's affections is for a willful and malicious injury to the person and property of another, and is not dischargeable;<sup>57a</sup> nor is a judgment in an action for malpractice,<sup>57b</sup> nor a judgment for a libel.<sup>57c</sup>

"*For Alimony Due or to Become Due.*"—Here the cases are numerous. Some have held that alimony due or to grow due is dischargeable;<sup>58</sup> others that alimony due before the bankruptcy is barred by the discharge;<sup>59</sup> some imply that alimony to accrue is not; while the majority of cases holds to the broader view that alimony, whether due or not, is not a debt at all, but a duty, liquidated in terms of money for convenience only, and, therefore, neither provable nor dischargeable.<sup>60</sup> In its ultimate analysis, the question turns on what alimony is, a debt or a duty, and reference will usually be had to the decision of the State granting the decree. Thus, it is thought, prior to the amendment of 1903, the Kentucky rule, which declares alimony both past and future merely a debt,<sup>61</sup> was not affected by *Audubon v. Schufeldt*,<sup>62</sup> wherein the Supreme

56. *Schroeder v. Frey*, 60 Hun (N. Y.), 58; *Strang v. Bradner*, ante. Consult also *Gee v. Gee*, 7 Am. B. R. 500.

57. See p. 208, ante.

57a. *Leicester v. Hoadley*, 9 Am. B. R. 318 (Kan. Sup. Ct.).

57b. *In re Flanders*, 10 Am. B. R. 379, 121 Fed. 936.

57c. *McDonald v. Brown*, 10 Am. B. R. 58 (R. I. Sup. Ct.).

58. *In re Houston*, 2 Am. B. R. 107, 94 Fed. 119. Compare *Fite v. Fite*, 5 Am. B. R. 461. Contra, *Maisner v. Maisner*, 6 Am. B. R. 295.

59. *In re Challoner*, 3 Am. B. R. 442, 98 Fed. 82; *Turner v. Turner*, 6 Am. B. R. 289, 108 Fed. 785; *In re Van Orden*, 2 Am. B. R. 801, 96 Fed. 86.

60. *Young v. Young*, 7 Am. B. R. 171; *Barclay v. Barclay*, 184 Ill. 375; *Dean v. Bloomer*, 191 Ill. 416; *Welty v. Welty* (Ill. Sup.), 63 N. E. 161; *In re Shepard*, 5 Am. B. R. 857, 97 Fed. 187; *In re Smith*, 3 Am. B. R. 68, and cases cited; *People v. Grell*, 65 N. Y. S. 522; *In re Nowell*, 3 Am. B. R. 837, 99 Fed. 931. Compare also *Audubon v. Schufeldt*, cited post; *In re Lachemeyer*, Fed. Cas. 7,966. See *Wetmore v. Wetmore*, 13 Am. B. R. 1 (U. S. Sup. Ct.).

61. *In re Houston*, supra; *Fite v. Fite*, supra.

62. 181 U. S. 575, 5 Am. B. R. 829. Compare also, for remedies, *Wagner v. Houston*, 4 Am. B. R. 596, 104 Fed. 133.

Court holds a judgment of the local courts of the District of Columbia awarding alimony not affected by the defendant's discharge.<sup>62a</sup> Indeed, the national scope of this opinion may be questioned, both the court below and the Supreme Court being, it is thought, without jurisdiction to determine the effect of the discharge in the proceeding in which it was granted.

*"For Maintenance or Support of Wife or Child."*—Here the broad principle that obligations to the sovereign are not discharged seems to exempt support or bastardy orders from the general rule that all provable liabilities are discharged. A husband's obligation to support his divorced wife under an agreement to pay her an annuity, "during her life, or until she remarries," is not a provable debt against the husband's estate in bankruptcy, and is not released by his discharge.<sup>62b</sup> The reported cases are few,<sup>63</sup> but the efficacy of the principle is not to be doubted, even without the affirmative declaration of the amendatory act of 1903. Since then, such obligations are not affected by a discharge in bankruptcy.

*"For Seduction of an Unmarried Female."*—Here, however, there is a sharp conflict of authority. It seems to turn on whether, under the laws of the State, the gravamen of the suit is loss of services or willful wrong.<sup>64</sup> Thus, in New York, the father is the suitor, and the injury can hardly be termed willful and malicious as to him.<sup>65</sup> In other States, the daughter may sue, and, though it is always doubtful whether that which is consented to can be willful and malicious, the weight of authority is against discharging

<sup>62a</sup>. In *North Carolina*, in the case of *Arrington v. Arrington*, 10 Am. B. R. 103 (N. C. Sup. Ct.), the court distinguished the case of *Audubon v. Shufeldt*, supra, and held that a final judgment for alimony entered in another State upon a decree for an absolute divorce is a provable and dischargeable debt. It was contended that the United States Supreme Court based its decision upon the fact that a decree for alimony is not a final judgment or decree; but a decree for alimony entered in a court in another State being held final by the courts of North Carolina the reasoning of the United States Supreme Court is not conclusive in that State.

<sup>62b</sup>. *Dunbar v. Dunbar*, 10 Am. B. R. 139, 190 U. S. 340, affirming 180 Mass. 170.

<sup>63</sup>. In re *Baker*, 3 Am. B. R. 101, 96 Fed. 954; In re *Hubbard*, 3 Am. B. R. 528, 98 Fed. 710; In re *Cotton*, Fed. Cas. 2,685; *Hawkes v. Cooksey*, 13 Ohio, 242. See contra, *McKittrick v. Cahoon*, 10 Am. B. R. 139 (Minn. Sup.), 95 N. W. 223.

<sup>64</sup>. Compare In re *Sullivan*, 2 Am. B. R. 30, with In re *Maples*, 5 Am. B. R. 426.

<sup>65</sup>. In re *McCauley*, 4 Am. B. R. 122; *Disler v. McCauley*, 7 Am. B. R. 142, reversing s. c., 6 Am. B. R. 491; In re *Sullivan*, supra.

liabilities to her of this character.<sup>66</sup> Were there nothing in the statute that seemed to refer to this class of wrongs, the broad principle that mere liabilities resting entirely in tort are not affected by bankruptcy would probably save them from the effect of a discharge, though the same question seems to have arisen under the English Act of 1883, which was silent on the point.<sup>67</sup> Each country has been forced to remedial legislation. Our amendatory law of 1903, like the English Act of 1890,<sup>68</sup> has now settled the question. Such liabilities, whether to father or to daughter, are hereafter excepted from the effect of a discharge. But, here, liabilities of this character need not be reduced to judgment to be within this exception, as in England.

*"For Criminal Conversation."*—Here the same difficulty exists. It is only by a stretch of meaning that a judgment of this character can be held "an injury to the person or property" of the husband, however heinous be the wrong.<sup>69</sup> However, the law is already settled in New York in favor of the nondischargeability of such a judgment, and by the court of last resort.<sup>70</sup> On principle, this conclusion is eminently right; as an interpretation of mere words, it may be doubted. The question has, however, been determined, the country over, by the amendatory act of 1903. Liabilities of this character are not barred by a discharge.

*The Amendatory Act of 1903.*—Its effect on this section has been noted in the previous paragraphs. The time when the amendatory act took effect as to pending proceedings is discussed elsewhere.<sup>71</sup> Put broadly, then, no liability growing out of breach of moral duty, whether in connection with the domestic relations or otherwise, save breach of promise of marriage, is affected by the judgment debtor's discharge.

*Other Willful and Malicious Injuries.*—It is well settled that, aside from the liabilities excepted by the amendatory act of 1903, obligations claimed to be within this subdivision must be (a) both willful and malicious injuries and (b) to the person or property of

66. In re Maples, *supra*. And compare, as disagreeing with the New York rule, In re Freche, 6 Am. B. R. 479.

67. See Act of 1883, § 30 (1).

68. See Act of 1890, § 10.

69. Compare In re Tinker, 3 Am. B. R. 580, 99 Fed. 79.

70. Colwell v. Tinker, 7 Am. B. R. 334, 169 N. Y. 531, 62 N. E. 668, 58 L. R. A. 765, affirming s. c., 6 Am. B. R. 434. This case was affirmed by the United States Supreme Court in 11 Am. B. R. 568, 193 U. S. 473.

71. See "Supplementary Section to Amendatory Act," post.

another.<sup>72</sup> Such, it is thought, would be a slander or a libel, and probably a malicious prosecution or an assault, and the cases *contra* under former laws are no longer controlling;<sup>73</sup> but a liability for trespass or for arrest due to negligence, even if after liquidation, is not. Each case will depend on its own facts. However, as this subdivision tends to impair the bankrupt's remedy, the statute being highly remedial, these exceptions should be so construed as to affect that remedy only so far as is necessarily required by its express terms.

**Subd. (3). Those not Scheduled.**— Here there is a notable departure from the weight of authority under the former law. Jurisdiction of the creditor now depends, not on the petition and the adjudication,<sup>74</sup> but on the facts, either that the debt was "duly scheduled in time for proof and allowance," or, if not, that the "creditor had notice or actual knowledge of the proceedings in bankruptcy." The cases thus far are uniform in interpreting the words of this subdivision to mean what they say.<sup>75</sup> The Supreme Court has also impliedly sustained the constitutionality of these provisions.<sup>76</sup> Extreme exactness must thus be used in describing the creditor by name, or he will not be "duly scheduled."<sup>77</sup> It is clear also that where the failure to schedule the actual owner of the debt was intentional, such debt will not be discharged,<sup>78</sup> but not if there was actual notice.<sup>78a</sup>

**Subd. (4). Fiduciary Debts.**— Manifestly the words "were created by his fraud, embezzlement, misappropriation, or defalcation

<sup>72</sup> Compare *In re Tinker*, supra; *In re Sullivan*, ante.

<sup>73</sup> For instance, *In re Simpson*, Fed. Cas. 12,879.

<sup>74</sup> *Black v. Blazo*, 117 Mass. 17; *Platt v. Parker*, 6 N. Y. Super. 377; *Lamb v. Brown*, Fed. Cas. 8,011.

<sup>75</sup> *Fider v. Mannheim*, 81 N. W. 2; *Tyrrel v. Hammerstein*, 6 Am. B. R. 430; *In re Beerman*, 7 Am. B. R. 431, 112 Fed. 662; *Hayer v. Comstock*, 7 Am. B. R. 493; *In re Monroe*, 7 Am. B. R. 706, 114 Fed. 393.

<sup>76</sup> *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 8 Am. B. R. 1.

<sup>77</sup> *Liesum v. Krauss*, 35 Misc. (N. Y.) 376. Here the creditor's name was Liesum, but he was scheduled as Liesman, and his debt was

held not discharged. See also *Columbia Bank v. Birkett*, 9 Am. B. R. 481, 174 N. Y. 112; affirmed in U. S. Sup. Ct., 12 Am. B. R. 691, in which case the bankrupts had scheduled a debt represented by their promissory note in the name of the payee, when they knew it was held by a discount bank, which had no notice or actual knowledge of the bankruptcy proceedings prior to the bankrupt's discharge; it was held that the bank was not bound thereby and could recover on the note against the bankrupts.

<sup>78</sup> *Columbia Bank v. Birkett*, 7 Am. B. R. 222.

<sup>78a</sup> *Zimmerman v. Ketchum*, 11 Am. B. R. 190 (Kan. Sup. Ct.), 71 Pac. 264.



while acting as an officer or in any fiduciary capacity" refer to such technical trusts as were included in the phrase "fiduciary debts" so frequently used in cases under the former law.<sup>79</sup> The distinction between mere frauds in fact and wrongs committed by private or public trustees was not so clearly indicated in the former law. Subdivision (2), with the limitations already indicated, now has to do with the one; subdivision (4) with the other. The words used in the Act of 1841, "debts contracted in consequence of a defalcation as a public officer or executor, administrator, guardian or trustee, or while acting in any fiduciary capacity" are very similar to and illuminate those in the present law. Thus far, however, few cases construing this section have found place in the books.<sup>80</sup>

*Who are Fiduciary Debtors.*— Manifestly only public officers and trustees; and not, as we have already seen, agents, factors, commissionmen, and the like.<sup>81</sup> The term "officer" probably means any public official who, from the nature of his duties, may be guilty

79. *Bracken v. Milner*, 5 Am. B. R. 23, 104 Fed. 522; *In re Bullis*, ante; *Morse v. Kaufman*, 7 Am. B. R. 549.

80. *Warren v. Robinson*, 61 Pac. 28; *Gerner v. Yates*, 84 N. W. 596.

The limitation of the application of this subdivision to fraud, embezzlement, misappropriation, or defalcation of the bankrupt while acting as an officer or in any fiduciary capacity is not according to the decisions in some jurisdictions. For instance, in the case of *Crawford v. Burke*, 11 Am. B. R. 15, 201 Ill. 581, it was held that the exception contained in the fourth subdivision applied to debts fraudulently created where no judgment had been obtained, or to those created by the embezzlement of the bankrupt regardless of the fact that he was not acting as an officer or in a fiduciary capacity. This case has been recently reversed by the Supreme Court of the United States, reported 12 Am. B. R. 659, and note. And in the case of *Watertown Carriage Co. v. Hall*, 11 Am. B. R. 15, 176 N. Y. 313, it was held that a complaint alleging that the defendant wrongfully and fraudulently embezzled and misappropriated the plain-

tiff's money stated a cause of action to which the discharge of the defendant in bankruptcy was no defense; the court cited in support of its contention the case of *Crawford v. Burke*, supra. See also *In re Wollack*, 9 Am. B. R. 685, 120 Fed. 516, where the court held that a fair interpretation of the section in the light of the previous act and the spirit of the law leaves no doubt but that fraud in a claim as well as a judgment based upon a fraudulent claim is sufficient to bring the claim within the exceptions of the statute. In the case of *Frey v. Torrey*, 8 Am. B. R. 196, 70 App. Div. (N. Y.) 166: affirmed on opinion below, 175 N. Y. 501, it was held that the words "while acting as an officer or in any fiduciary capacity," do not qualify the words "fraud," "embezzlement," and "misappropriation," but only the word "defalcation."

81. See p. 208, ante. And compare *Chapman v. Forsyth*, 2 How. 202; *Hennequin v. Clews*, 111 U. S. 676; *In re Brown*, Fed. Cas. 1,979; *In re Basch*, 3 Am. B. R. 235, 97 Fed. 761; *In re Bullis*, ante.

of embezzlement, misappropriation, or defalcation in office;<sup>82</sup> and, it is thought, the word "misappropriation" means little more than its companion word "embezzlement." The term "fraud \* \* \* in any fiduciary capacity" clearly refers to wrongs committed by such private trustees as attorneys,<sup>83</sup> executors,<sup>84</sup> guardians,<sup>85</sup> and trustees in general.<sup>86</sup> But it is well settled that the sureties on the bonds of such trustees are not bound to a fiduciary obligation, and a discharge of the surety will be an available bar.<sup>87</sup> On the other hand, partners<sup>88</sup> and bankers,<sup>89</sup> like agents, factors,<sup>89a</sup> and commissionmen, do not usually act in a fiduciary capacity.

#### IV. PLEADING DISCHARGE.

**In General.**—This subject is discussed elsewhere.<sup>90</sup> A discharge being only available in bar, it must be regularly pleaded.<sup>91</sup> Under the former law, the method was prescribed.<sup>92</sup> Now, though there is no certificate, any form of plea corresponding to the practice of the court in which it is entered will be sufficient. A certified copy of the order of discharge or confirming the composition, with brief allegations identifying it and fixing the time, is the usual method.<sup>93</sup> A reply or replication to an answer setting up a discharge, as that the debt sued on is for fraud, is not necessary in the code States; proof of that fact may be made without such a

82. *Morse v. Lowell*, 48 Mass. 152; *Richmond v. Brown*, 66 Me. 373; *Johnson v. Auditor*, 78 Ky. 282; *Courtney v. Beale*, 84 Va. 692.

83. *Flanagan v. Pearson*, 42 Tex. 1; *Heffner v. Jayne*, 39 Ind. 463. *Contra*, *Wolcott v. Hodge*, 81 Mass. 547.

84. *Laramore v. McKinzie*, 60 Ga. 532. And compare *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312.

85. *Simpson v. Simpson*, 80 N. C. 332; *In re Maybin*, Fed. Cas. 9,337.

86. *Flagg v. Ely*, 1 Edm. Sel. Cas. 206; *Pinkston v. Brewster*, 14 Ala. 315; *Kingsland v. Spalding*, 3 Barb. Ch. (N. Y.) 341.

87. *Ex parte Taylor*, Fed. Cas. 13,773; *Reitz v. People*, 72 Ill. 435; *U. S. v. Thockmorton*, Fed. Cas. 16,516.

88. *Pierce v. Shippee*, 90 Ill. 371; *Hill v. Sheibley*, 68 Ga. 556; *Gee v. Gee*, 84 Minn. 384.

89. *Shaw v. Vaughan*, 52 Mich. 405; *Maxwell v. Evans*, 90 Ind. 596.

89a. *In re Butts*, 10 Am. B. R. 16, 120 Fed. 966; *Harrington & Goodman v. Herman* (Mo. Sup.), 72 S. W. 546.

90. See under Section Fourteen, ante.

91. For general remedies under a discharge under present law, see *Bank of Commerce v. Elliott*, 6 Am. B. R. 409, and compare *Collins v. McWalters*, 6 Am. B. R. 593. See also *Dimock v. Revere Copper Co.*, 117 U. S. 559; *Horner v. Spellman*, 78 Ill. 206, 410; *In re Wesson*, 88 Fed. 855.

92. See § 34, R. S., § 5119.

93. *Bryant v. Kingston*, 86 N. W. 531; *Morse v. Cloyes*, 11 Barb. (N. Y.) 100; *Stoll v. Wilson*, 38 N. J. 198. For effect of order as evidence, see § 21-f, post.

plea.<sup>94</sup> It must appear that the liability pleaded against existed at the time of the bankruptcy. A discharge can only be pleaded by the bankrupt or his privies in title.<sup>95</sup>

*As Dependent on Time.*—If the suit is pending at the time of bankruptcy, it may be stayed until the discharge is granted.<sup>96</sup> If not stayed and a judgment is entered before discharge, the discharge may be availed of as a bar to further remedies on the judgment.<sup>97</sup> The same is true if the action is begun after the bankruptcy. If the suit is commenced after the discharge, a stay cannot be granted, and the discharge itself must be pleaded.<sup>98</sup> Where, however, the cause is on appeal when the discharge becomes available, it usually will not act as a bar, though this depends on the practice and law of each State.<sup>99</sup> The usual method of pleading where the discharge was not available in time is by motion to open default and for leave to interpose a plea in bar by answer original or supplemental.<sup>100</sup> Such an application is addressed to the discretion of the court and may be denied, if there has been a long delay in making it,<sup>101</sup> or on jurisdictional grounds. It will not be granted where the judgment antedates the bankruptcy and then resulted in a vested lien.<sup>102</sup>

#### V. REVIVAL OF DISCHARGED DEBT BY NEW PROMISE.

**Effect and How Accomplished.**—This is the converse of failure to assert a discharge in bar. A debt discharged is not a debt paid. The moral obligation remains, and is a sufficient consideration for a new promise to pay.<sup>103</sup> An oral promise will be sufficient, unless a written promise is required by local statute.<sup>104</sup> Whether oral or

94. *Argall v. Jacobs*, 87 N. Y. 110; but is otherwise in the common-law States, *Cutter v. Folsom*, 17 N. H. 139.

95. *Upshur v. Briscoe*, 138 U. S. 365; *Fleitas v. Richardson*, 147 U. S. 550. See also *Baer v. Grell*, 6 Am. B. R. 428.

96. See p. 140, ante.

97. *Wolf v. Stix*, 99 U. S. 1; *Hill v. Harding*, 130 U. S. 699.

98. *Dimock v. Revere Copper Co.*, supra.

99. *Wolf v. Stix*, supra; *Cornell v. Dakin*, 38 N. Y. 253; *Bank v. Onion*, 16 Vt. 40; *Haggerty v. Morrison*, 59 Mo. 324.

100. *Boynton v. Ball*, 121 U. S.

457; *Holyoke v. Adams*, 59 N. Y. 233; *Richards v. Nixon*, 20 Pa. St. 19; *Fellows v. Hall*, Fed. Cas. 4,722.

101. *Medbury v. Swan*, 46 N. Y. 200.

102. *Barstow v. Hansen*, 2 Hun (N. Y.), 333.

103. *Mutual Reserve, etc. v. Beatty*, 2 Am. B. R. 244, 93 Fed. 747; *Dusenberry v. Hoyt*, 53 N. Y. 521; *Marshall v. Tracy*, 74 Ill. 379; *Maxim v. Morse*, 8 Mass. 127; *In re Merri-man*, 44 Conn. 587.

104. *Smith v. Stanchfield*, 7 Am. B. R. 498; *Henly v. Lanier*, 75 N. C. 172; *Apperson v. Stewart*, 27 Ark. 619.

in writing, it must be definite, express, distinct, and unambiguous.<sup>105</sup> It would not be sufficient to make a conditional offer of payment which was not accepted by the creditor.<sup>105a</sup> Cases under the former law were numerous and will prove as valuable under this.<sup>106</sup>

105. *In re Lorillard*, 5 Am. B. R. 602, 107 Fed. 677; *Tompkins v. Hazen*, 5 Am. B. R. 62; *Smith v. Stanchfield*, supra; *In re Collier*, 93 Fed. 191; *Allen v. Ferguson*, 18 Wall. 1; *Church v. Winkley*, 73 Mass. 460; *Thornton v. Nichols and Lemon*, 11 Am. B. R. 304 (Ga. Sup.).

105a. *International Harvester Co. v. Lyman*, 10 Am. B. R. 450 (Minn. Sup.).

106. See *Jersey City Ice Co. v.*

*Archer*, 122 N. Y. 376; *Otis v. Garlin*, 31 Me. 567; *Wheeler v. Wheeler*, 28 Ill. App. 385; *Willis v. Cushman*, 115 Ind. 100; *Craig v. Seitz*, 63 Mich. 727; *Cambridge Institution v. Littlefield*, 60 Mass. 210; *Dusenberry v. Hoyt*, supra; *Badger v. Gilmore*, 33 N. H. 361; *Murphy v. Crawford*, 114 Pa. St. 496; *Shuman v. Strauss*, 52 N. Y. 404. See also article in the *National Bankruptcy News and Reports* for February 15, 1900.

## SECTION EIGHTEEN.

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### PROCESS, PLEADINGS, AND ADJUDICATIONS.

§ 18. **Process, Pleadings, and Adjudications.**— *a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits<sup>1</sup> *to enforce a legal or equitable lien\** in courts of the United States, *except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.\**

*b* The bankrupt, or any creditor, may appear and plead to the petition within<sup>2</sup> *five* days after the return day, or within such further time as the court may allow.

*c* All pleadings setting up matters of fact shall be verified under oath.

*d* If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

*e* If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

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1. Here the words "in equity" were stricken out by the amendatory act of 1903, and the words in italics substituted.

2. Here the word "five" was substituted for the word "ten" by such amendatory act.

*f* If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

*g* Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

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**Analogous provisions:** In U. S.: *As to service of process*, Act of 1867, § 40, R. S., § 5025 (as amended by Act of June 22, 1874); Act of 1841, § 1; Act of 1800, § 3; *As to appearances, pleading, trial, and adjudication*, Act of 1867, §§ 41, 42, R. S., §§ 5026 (as amended by the Act of June 22, 1874), 5028, 5029, 5030, 5031; Act of 1841, § 1; Act of 1800, § 3.

**In Eng.:** Act of 1883, § 7 (1), General Rules 153, 154, 155, 156, 156A; *As to appearances, pleading, and trial*, § 7 (2) (3) (4) (5), General Rules, 157-169; *As to receiving order*, § 8 (1); General Rules 176, 177; *As to adjudication*, § 20 (1), General Rules 190, 191, 192, 192A, 193.

**Cross references:** **To the law:** §§ 1 (2) (9) (20); 2 (1); 3; 4; 5; 19; 21-b-c; 22; 31; 32; 38; 59; 69.

**To the General Orders:** II, III, IV, V, VI, VII, VIII, IX, XI.

**To the Forms:** Nos. 1, 2, 3, 4, 5, 6, 7, 11, 12, 14, 15.

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## SYNOPSIS OF SECTION.

### I. Limitation and Scope.

Practice in General.

Limitations of Section.

Scope.

### II. Subs. a. Frame of Petitions and Service of Process.

Petitions in General.

*Petitions, how Framed.*

*Petition Confers Jurisdiction.*

*Amendment of Petitions.*

Process and Service.

*When Returnable.*

*Service of Process.*

§ 18.]

## Synopsis of Section.

**II. Subs. a. Frame of Petitions and Service of Process — Continued.**

Process and Service — Continued.

*On Absentees.**On Corporations, Infants, Lunatics, etc.**Effect of Service on Jurisdiction in Personam and in Rem.**Meaning of Amendments of 1903.**Objections to Regularity of Subpœna or Method of Service.**Service on Nonjoining Partner.**Proof of Service.***III. Subs. b. Appearances and Pleadings.**

Who May Appear and Plead.

*Effect of Voluntary Appearance by the Bankrupt.*

When to Appear and Plead.

*Extension of Time.*

How Appearances and Pleadings are Made.

What Pleadings May be Entered.

*Illustrative Cases.***IV. Subs. c. Verification of Pleadings.**

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Whether by Attorney.

**V. Subs. d. Trials in Involuntary Cases.**

Without a Jury.

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*Dismissals by Consent.**Intervention by Other Creditors.*

Vacating the Adjudication.

**VI. Subs. e, f. Defaults.**

Where the Judge is in the District or Division.

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**VII. Subs. g. Voluntary Cases.**

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*Voluntary Petition while Involuntary Petition Pending.***VIII. Miscellaneous.**

Effect of Adjudication.

Order of Reference and Effect.

*Subsequent Proceedings.*

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I. LIMITATION AND SCOPE.

**Practice in General.**—The practice under the present law differs so much from that under the law of 1867, that any extended refer-

ence to the latter would but confuse. Practice in bankruptcy is regulated largely by the General Orders and Forms,<sup>3</sup> supplemented by local rules and sometimes additional forms, and, where none of these apply, by the equity practice in the United States courts.<sup>4</sup> Throughout this work, an effort is made to explain the practice suggested by each section of the law and the paragraphs on "Practice" found elsewhere should always be consulted. It may be suggested, however, to practitioners in the code States, that the technical observance of rules and formulas, there made so much of by both the bar and the bench, will generally not be necessary in bankruptcy practice. A clear understanding of the remedy desired and a common-sense method of seeking it will usually be sufficient, even though there be modal slips or omissions. Numerous forms suggested by the writer's experience will be found in "Supplementary Forms," *post*.

**Limitations of Section.**—For convenience of reference the limitations of Section Eighteen are here set out.

It does *not* have to do with :

1. *Who may and who may not file a voluntary petition*; for that, see §§ 4-a, 59-a; or
2. *Who may and who may not file an involuntary petition*; for that, see § 59-b; or
3. *Against whom and when an involuntary petition may be filed*; for that, see §§ 3-b, 4-b; or
4. *In what court a petition must be filed*; for that, see § 2 (1); or
5. *Whether and, if so, how petitions may be filed by or against partners or corporations*; for that, see §§ 4-b, 5-a; or
6. *The jurisdictional allegations in voluntary petitions*; for that, see §§ 2 (1), 4-a, 5-a, and, for the schedules to accompany the same, § 7 (8); or
7. *The jurisdictional allegations in involuntary petitions*; for that, see §§ 2 (1), 3-a-b, 4-b, 5-a, 59-b; or
8. *The office for filing and the number of copies to be filed*; for that, see § 59-a in voluntary cases, and § 59-c in involuntary cases, and, for schedules, § 7 (8); or
9. *The answer and procedure thereon when less than three creditors petition*; for that, see § 59-d-e; or

<sup>3</sup>. See cross-references to General Orders and Forms, *ante*; also General Order XXXVIII.

<sup>4</sup>. See Equity Rules, *post*.



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 Subs. a.]                      Frame of Petitions; Service of Process.
 

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10. *The intervention of creditors other than the petitioning creditors*; for that, see § 59-f; or

11. *The dismissal of petitions other than on the merits*; for that, see § 59-g; or

12. *The (a) interference with the alleged bankrupt's property pending adjudication; or (b) stays other than against suits; or (c) stays against suits*; for these, see §§ 2 (7) (15), 11; or

13. *The appointment of receivers or the custody of the bankrupt's property before adjudication*; for that, see §§ 2 (3) (15), 3-e, 69.

*Scope.*—In short, this section has only to do with such practice as is incident to a proceeding in bankruptcy from the moment a petition is duly filed to the moment that petition is either dismissed or results in an adjudication coupled with a reference to the referee. In voluntary cases, this time is inappreciable. In involuntary cases, it may stretch over months. Further, though thus limited, § 18, as has been noted, is silent as to certain procedure usually availed of in involuntary cases, as that on stays and seizure of assets; and the succeeding section is controlling on jury trials.

## II. Subs. a. FRAME OF PETITIONS AND SERVICE OF PROCESS.

**Petitions in General.**—The allegations in and method of drawing petitions is discussed under Sections Three, Four, Five, and Fifty-nine of this work.

**Petitions, how Framed.**—General Order V provides that "all petitions and schedules shall be printed or written out plainly." The official forms should, where possible, be used.<sup>5</sup> The simple forms of bankruptcy practice found in the general orders and forms prescribed by the Supreme Court should be followed without unnecessary departure therefrom.<sup>5a</sup> Blanks printed without ruling and of such size as to permit use in typewriting machines will be found most convenient. Forms Nos. 1, 2, and 3 are suggestive of the petitions by individuals, by partners, and in involuntary cases. That in partnership cases is not entirely reliable;<sup>6</sup> and that for

5. *Mahoney v. Ward*, 3 Am. B. R. 770, 100 Fed. 278.

5a. *Gage & Co. v. Bell*, 10 Am. B. R. 696, 124 Fed. 371.

6. See criticisms and suggestions under Section Five, p. 70, ante. See also "Supplementary Forms," post.

involuntary cases is less so;<sup>7</sup> thus, if a partner does not join in a petition for involuntary bankruptcy, that fact should be stated, his address given, and the prayer of the petition ask for a subpœna to him as though he were an alleged involuntary bankrupt.<sup>8</sup> Jurisdictional allegations should not be disjunctive in form.<sup>9</sup> The petition in involuntary proceedings may set forth several and distinct acts of bankruptcy.<sup>9a</sup> The necessary allegations in both voluntary and involuntary petitions are discussed at length in other places.<sup>10</sup> The schedules, and presumably the petition in voluntary cases, must be drawn and verified in triplicate.<sup>11</sup> In involuntary cases, in duplicate.<sup>12</sup> They should always be filed with the clerk,<sup>13</sup> but handing them to him outside of his office has been held sufficient.<sup>14</sup> They must be accompanied by the fees of the officers, or, in lieu thereof, by a pauper affidavit.<sup>15</sup>

*Petition Confers Jurisdiction.*—The moment the petition is filed, jurisdiction begins. This is the commencement of the proceeding, even though the subpœna does not immediately issue,<sup>16</sup> or, if issued, is not served within the time limited.<sup>17</sup>

*Amendment of Petitions.*—Whether to permit an amendment of a petition<sup>18</sup> is a matter of discretion. It will usually be granted to cure an error due to mistake of counsel,<sup>19</sup> or one purely clerical,<sup>20</sup> or to supply an omission to specifically allege that the alleged bankrupt is not within one of the excepted classes,<sup>20a</sup> or to make the

7. Consult Section Three, pp. 36-47, ante, for allegations as to acts of bankruptcy; Section Four, p. 60, ante, for allegations as to the excepted classes; Section Fifty-nine, post, for allegations as to number of petitioning creditors, the amount of their claims, etc.

8. In re Russell, 3 Am. B. R. 91, 97 Fed. 32; In re Altman, 2 Am. B. R. 407, 95 Fed. 263; In re Murray, 3 Am. B. R. 90; Mahoney v. Ward, 3 Am. B. R. 770.

9. In re Laskaris, 1 Am. B. R. 480.

9a. Bradley Timber Co. v. White, 10 Am. B. R. 329, 121 Fed. 779, affirming 9 Am. B. R. 441.

10. See under Sections Two, Three, Four, Five, and Fifty-nine. For forms suggested as substitutes for Forms Nos. 2 and 3, see "Supplementary Forms," post.

11. § 7 (8).

12. § 59-c.

13. See General Order II. Compare In re Sykes, 6 Am. B. R. 264, 106 Fed. 669.

14. In re Wolf, 2 Am. B. R. 322.

15. § 51-a (2).

16. In re Appel, 4 Am. B. R. 722, 103 Fed. 931; In re Stein, 5 Am. B. R. 288, 105 Fed. 749; In re Lewis, 1 Am. B. R. 458, 91 Fed. 632.

17. In re Frischberg, 8 Am. B. R. 607.

18. Consult Section Seven for amendments of schedules.

19. In re Hill, Fed. Cas. 6,485. See also In re Freund, 1 Am. B. R. 25.

20. In re Bellah, 8 Am. B. R. 310, 116 Fed. 49.

20a. Beach v. Macon Grocery Co., 9 Am. B. R. 762 (C. C. A.), 120 Fed. 736.

pleadings conform to the facts proven, even on the coming in of the special master's report,<sup>21</sup> or to bring a pending petition within the terms of an amendatory act.<sup>22</sup> But amendments going to the jurisdiction,<sup>23</sup> or after an unreasonable delay,<sup>24</sup> or which in effect become the basis of a new and independent proceeding,<sup>25</sup> or which would add a later act of bankruptcy than that originally alleged,<sup>26</sup> will not be granted. Amendments before adjudication can, it is thought, be granted only by the judge, and not by a referee sitting as special master, though there is authority for the opposite view.<sup>27</sup> The practice varies. The application to amend may take the form of an oral motion on the trial.<sup>28</sup> Usually it is asked on a petition or affidavits, accompanied by a copy of or including the proposed amendments,<sup>29</sup> on due notice to the other parties. If granted, it relates back to the time the petition was filed and has the same effect as if included in the original petition.<sup>30</sup> An amendment which introduces new matter should be met by an answer, or it will be taken as admitted.<sup>31</sup> General Order XI seems to refer particularly to petitions in voluntary cases; it is not exclusive of the power to permit amendments inherent in the court.<sup>32</sup> It is thought that Equity Rules XXVIII to XXX suggest a good practice where amendment of an involuntary petition is desired. General Order VI has been held to imply a limitation on amendments.<sup>33</sup>

21. *In re Lange*, 3 Am. B. R. 231, 97 Fed. 196; *In re Miller*, 5 Am. B. R. 140, 104 Fed. 764; *In re Bining*, Fed. Cas. 1,420; *In re Gallinger*, Fed. Cas. 5,202.

22. *In re Scammon*, Fed. Cas. 12,427; *In re Scull*, Fed. Cas. 12,568.

23. *In re Rosenfields*, Fed. Cas. 12,061. *Contra*, *Ex parte Jewett*, Fed. Cas. 7,303; *In re Craft*, Fed. Cas. 3,317.

24. *In re Freudenfels*, Fed. Cas. 5,112a.

25. *In re Hyde & Co.*, 4 Am. B. R. 602, 103 Fed. 617; *In re Mercur*, 8 Am. B. R. 275, 116 Fed. 655; affirmed, 10 Am. B. R. 505, 122 Fed. 384, where it was held that the right to amend can go no further than to bring forward and make effective that which is in some form already in the record.

26. *Matter of Riggs Restaurant Co.*, 11 Am. B. R. 508 (C. C. A.),

130 Fed. 691; *In re Sears*, 8 Am. B. R. 713, 117 Fed. 294, reversing in part *In re Sears*, 7 Am. B. R. 279, 112 Fed. 58. Compare also *Reed v. Cowley*, Fed. Cas. 11,644; *In re Morse*, Fed. Cas. 9,851; *In re Leonard*, Fed. Cas. 8,255.

27. *In re Strait*, 2 Am. B. R. 308.

28. Compare *In re Waite*, Fed. Cas. 17,044.

29. See "Supplementary Forms," post, for forms for amendment of schedules, which may be adapted to cases where petitions only are to be amended.

30. *In re Beerman*, 7 Am. B. R. 431, 112 Fed. 662; *In re Williams*, Fed. Cas. 17,700; *Bank v. Sherman*, 101 U. S. 403, affirming Fed. Cas. 12,765.

31. *In re Bining*, Fed. Cas. 1,420.

32. *In re Bellah*, ante.

33. *In re Sears*, supra.

**Process and Service.**—There is no need of process in voluntary cases; an adjudication usually follows and a reference is forthwith made to the referee. On the filing of an involuntary petition, the clerk must at once issue a subpoena, at the bottom of which must be the memorandum required by Equity Rule XII, and it and the duplicate petition must then be served “in the same manner that service \* \* \* is now had upon the commencement of a suit in equity in the courts of the United States.”<sup>34</sup>

*When Returnable.*—The time here is shorter than in the equity practice. An effort was made by the framers of the Ray amendatory bill to reduce the period to ten days. The Senate thought otherwise and the law, therefore, stands as originally passed, viz.: “within fifteen days.” But the court may, for cause, fix a longer time.

*Service of Process.*—Form No. 4, being an order requiring the alleged bankrupt to show cause why the prayer of the petition should not be granted, is clearly an inadvertent inheritance from the practice under the former law, and, to say the least, confusingly superfluous. Under the present law, the subpoena has taken its place; the order to show cause is no longer required, and should be ignored, as contrary to the statute. Indeed, the words of Form No. 4, requiring the marshal to serve the papers either personally or “by leaving the same at his (the alleged bankrupt’s) last usual place of abode in said district,” and the time limit on service therein fixed, seem of more than questionable validity. By its reference to the equity practice, this subsection seems in effect to have enacted Equity Rule XIII into the law.<sup>34a</sup> On the other hand, even before the amendatory act of 1903, the method of service in vogue in equity was limited by the words “in case personal service cannot be made,” thereby excluding the method followed under the former law, *i. e.*, of leaving the papers with an adult member of his family at his home, when personal service was impossible. The marked difference between the former statute and the present in this particular should be noted.<sup>35</sup> Under the act as amended it has been held that service of a copy of an involuntary petition with a subpoena upon the clerk of the hotel of which the alleged bankrupt

34. Equity Rule XII.

34a. *In re Risteen*, 10 Am. B. R. 494, 122 Fed. 732.

35. Compare § 40, R. S., § 5025:

“Served on the debtor by delivery of same to him personally, or leaving the same at his last or usual place of abode, etc.”

Subs. a.]      On Corporations, Infants, etc.; on Absentees.

was proprietor and where he usually resided, is valid without publication.<sup>35a</sup> Personal service out of the district is unavailing.<sup>36</sup>

*On Corporations, Infants, Lunatics, etc.*—In the absence of controlling federal rules on practice, the method prescribed by the state law may be followed. But, it seems, service cannot usually be made within the district on the officer of a nonresident corporation, temporarily therein.<sup>37</sup> The better practice, in all cases not covered by federal rules, is to secure an order directing how service shall be made.

*On Absentees.*—The present law does not deny a discharge to the absconding debtor; most previous laws, here and elsewhere, have. Cases of abscondence are frequent, and the method of service in such cases, especially where the debtor has left the country, differs in different districts.<sup>38</sup> That such method might be uniform and existing doubts be cleared up, the amendatory act of 1903 has provided a summary means of serving such a debtor by publication. It may have been that the words "as provided by law for notice by publication in suits in equity," in the original statute, referred to § 738<sup>39</sup> of the Revised Statutes, a bankruptcy proceeding being in the nature of a creditor's bill to assert an equitable lien. Still, there was doubt. There can be none now. The Senate here also lengthened the time by providing that service by publication should not be complete until ten days after the last publication; the Ray bill would have made the period "twenty days after the first publication." Thus, absentee bankrupts can, in fact must, be served hereafter in the way prescribed by the section of the Revised Statutes above referred to, save that, unless the judge shall otherwise direct, the publication shall be "not more than once a week for two consecutive weeks,"<sup>40</sup> and the return day shall be ten days after the last publication." In other words, service on absentees will hereafter take less than two weeks longer than personal service within the district.<sup>41</sup>

<sup>35a</sup>. In re Risteen, 10 Am. B. R. 494, 122 Fed. 732.

<sup>36</sup>. Note Jobbins v. Montague, Fed. Cas. 7,329; Herndon v. Ridgway, 17 How. 424.

<sup>37</sup>. Godley v. Morning News, 156 U. S. 518.

<sup>38</sup>. In re Burka, 5 Am. B. R. 843, 107 Fed. 674.

<sup>39</sup>. As modified concerning the time of publication by the Act of March 31, 1875.

<sup>40</sup>. In re Bellamy, Fed. Cas. 1,266. See also In re Hall, Fed. Cas. 5,922.

<sup>41</sup>. For form of order, see "Supplementary Forms," post.

*Effect of Service on Jurisdiction in Personam and in Rem.*—Nor is it thought that that portion of § 738 which, in cases of service by publication, limits the jurisdiction thus acquired to the property of the bankrupt within the district, is applicable to a proceeding in bankruptcy. The whole theory of that proceeding is against such a view. On adjudication, the trustee becomes vested with the bankrupt's property, wherever it is, and, subject to the orders of the court whose officer he is, may take possession of it and dispose of it as freely as the bankrupt could before the petition was filed.<sup>42</sup> Even should the opposite view prevail, ancillary proceedings in the other districts will supply the necessary jurisdiction.<sup>43</sup>

*Meaning of Amendments of 1903.*—Thus, the changes made by the amendatory act probably mean that (a) service must hereafter be either strictly personal<sup>43a</sup> within the district or by publication, (b) that, in either event, the return day shall be, in the one case, not more than fifteen, and, in the other case, not more than ten days after the last publication, while (c) the jurisdiction, both *in personam* and *in rem*, at least remains as it was before the amendments.<sup>44</sup>

*Objections to Regularity of Subpœna or Method of Service.*—These may be made specially by a motion to quash the subpœna, or to set aside the order of publication.<sup>45</sup>

*Service on Nonjoining Partner.*—Where one of two or more partners does not join in a voluntary petition for the bankruptcy of the firm, the proceeding is voluntary as to the petitioning partners and involuntary as to the nonjoining partner; before an adjudication can be had, a subpœna must issue, and, with a copy of the petition, be served on the latter; and he may defend as though an alleged involuntary bankrupt.<sup>46</sup> If the petition be against a partnership, one of whose members is an absentee, he must be brought in by publication as if the petition were against him solely.<sup>47</sup>

42. Compare § 70-a.

43. Compare *Lathrop v. Drake*, 91 U. S. 516; *Shainwald v. Lewis*, 5 Fed. 513; *Mason v. Hartford*, 19 Fed. 53.

43a. Compare *In re Risteen*, 10 Am. B. R. 494, 122 Fed. 732.

44. For reasons for these changes, see Report of Ex. Com. of Referees

in Bankruptcy, published March, 1900, p. 24.

45. *Romaine v. Union Ins. Co.*, 28 Fed. 625, at 634-635; *Gregory v. Pike*, 79 Fed. 520.

46. General Order VIII.

47. *In re Murray*, 3 Am. B. R. 601, 96 Fed. 600.

Subs. b.]

Appearances and Pleading.

*Proof of Service.*—If the subpoena is served by the marshal or his deputy, return is made by the usual certificate duly indorsed. If by some other designated person, by affidavit.<sup>48</sup>

### III. Subs. b. APPEARANCES AND PLEADINGS.

**Who May Appear and Plead.**—Either “the bankrupt or any creditor” may appear and plead. The “bankrupt” means here the alleged bankrupt;<sup>49</sup> “creditor” includes any one who owns a demand or claim provable in bankruptcy.<sup>50</sup> Under the former law, creditors, even if secured or preferred, and even attachment creditors, could resist an involuntary petition.<sup>51</sup> Under the phrasing of this law and the decisions interpreting it, it would seem that a preferred creditor or one who has an attachment cannot do so, without surrendering his preference or attachment,<sup>52</sup> a doctrine which also excludes all creditors secured in full. Neither of these classes has a “claim provable in bankruptcy,”<sup>53</sup> howsoever great may be such a person’s interest in preventing an adjudication.

*Effect of Voluntary Appearance by the Bankrupt.*—A voluntary appearance by the bankrupt is equivalent to personal service, but only so far as to confer jurisdiction of the person.<sup>54</sup> Jurisdiction *in rem* cannot be conferred by appearance or consent

**When to Appear and Plead.**—The amendments of 1903 have accomplished a slight change here. The time within which to appear and plead is now five and not ten days. It is difficult to understand why the appearance and pleading should not be coincident with the return day, as suggested by the Ray bill; but the Senate thought otherwise. But the time to appear and plead does

48. See Equity Rule XV.

49. See § 1 (4).

50. See § 1 (9).

51. In re Hatje, Fed. Cas. 6,215; In re Bergerson, Fed. Cas. 1,342; In re Jack, Fed. Cas. 7,119. Consult also In re Frost, Fed. Cas. 5,134; In re Green Pond R. Co., Fed. Cas. 5,786; In re Williams, Fed. Cas. 17,703.

52. In re Burlington Malting Co., 6 Am. B. R. 369, 109 Fed. 777; In re Rogers Milling Co., 4 Am. B. R. 540; In re Schenkein and one, 7 Am. B. R. 162, 113 Fed. 421.

53. See §§ 57-e-g, 59-b, 60-b, and 63-a, and cases construing them.

54. In re Mason, 3 Am. B. R. 599, 99 Fed. 256; In re Altman, ante; Shutts v. Bank, 3 Am. B. R. 492, 98 Fed. 705.

not expire until the last day limited;<sup>55</sup> a doctrine, which, since every creditor has a right to resist the petition, seems to prevent an adjudication by consent of the alleged bankrupt before the expiration of that time.<sup>56</sup>

*Extension of Time.*—Appearance or pleading, or both, may also be permitted “within such further time as the court may allow,” and a meritorious pleading filed late may be considered, if so ordered by the judge.<sup>57</sup> But the court will not usually grant long extensions, or those for which good reasons are not given.<sup>58</sup> A mere stipulation, not brought to the attention of the court or resulting in an order, is, in the absence of rules to the contrary, not sufficient.<sup>59</sup>

**How Appearances and Pleadings are Made.**—Here the statute is silent. A practice is suggested in General Orders IV and XXXII, and Equity Rule XVII. There is no form prescribed, but those used in the equity practice may be followed.<sup>60</sup> Appearances may be in person or by attorney; if the latter, the attorney must be one admitted to practice in the district or circuit court of the district.<sup>61</sup> The authority of an attorney to appear cannot be questioned by the answer of the defendant debtor.<sup>61a</sup> A power of attorney to appear in response to a creditors’ petition is not necessary. The duties of the clerk on the entry of appearances and pleas are prescribed in the General Orders.

**What Pleadings May be Entered.**—These are fixed by the “Equity Rules established by the Supreme Court;” at least, in all bankruptcy proceedings as distinguished from independent suits in law.<sup>62</sup>

55. Day v. Beck, etc., Co., 8 Am. B. R. 175, 114 Fed. 834.

56. In re Humbert, 4 Am. B. R. 76, 100 Fed. 439. Compare In re Columbia Real Estate, 4 Am. B. R. 411, 101 Fed. 965, where adjudication by consent on the day the petition was filed was, however, held not null and void. See also, for far-reaching effect of an adjudication by default, In re American Brewing Co., 7 Am. B. R. 463, 112 Fed. 752.

57. General Order XXXII. Compare In re Simonson, 1 Am. B. R. 197, 92 Fed. 904.

58. In re Heinsfurter, 3 Am. B. R. 109, 97 Fed. 198.

59. In re Simonson, *supra*.

60. For forms, see “Supplementary Forms,” post.

61. General Order IV. Compare In re Kindt, 3 Am. B. R. 546, 98 Fed. 867.

61a. Gage Co. v. Bell, 10 Am. B. R. 696, 124 Fed. 371.

62. General Order XXXVII. Compare for meaning of “proceedings in bankruptcy,” *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163.



## Subs. b.]

## Illustrative Cases.

Thus, the bankrupt or any creditor may (a) demur or answer,<sup>63</sup> and the petitioning creditors may (b) except to the answer, or, in proper cases, may (c) file a general replication. If the demurrer is sustained, leave to answer is usually granted. In these ways, the issue is framed.<sup>64</sup> But the judge may modify these rules in "any particular case so as to facilitate a speedy hearing."<sup>65</sup> Amendments to all pleadings, other than the petition, and perhaps even amendments to involuntary petitions, should be made in accordance with the practice outlined in the Equity Rules.<sup>66</sup> If a jury trial is desired, it should be applied for when the answer is entered, but in a separate paper.<sup>67</sup>

*Illustrative Cases.*—When a petition does not show all the jurisdictional facts, as that the alleged bankrupt is not within the excepted classes, the proper plea is a demurrer,<sup>68</sup> however, in such a case, as in all cases where the defense goes to the jurisdiction, it may be taken by answer as well,<sup>69</sup> but, where the answer is on the merits, it waives the demurrer.<sup>70</sup> A demurrer cannot, it seems, be interposed to an answer, but the points which might be raised by such a demurrer may be raised on the hearing of the petition and answer.<sup>71</sup> The form of the answer is suggested by Form No. 6; but "the denial of bankruptcy" may contain also any available defense or counterclaim.<sup>72</sup> If it is prolix and admixed with supposed grounds of demurrer, and does not admit or unequivocally deny the material facts of the petition, it may be stricken out.<sup>72a</sup> If no replication is filed to the answer, the latter is taken as true,

63. The two have even been combined in one pleading, *In re Stern*, 8 Am. B. R. 569, 116 Fed. 604; for a case where demurrer was interposed, see *In re Ewing*, 8 Am. B. R. 269, 115 Fed. 707. See also *In re Randall*, Fed. Cas. 11,551; *Orem v. Harley*, Fed. Cas. 10,567.

64. See Equity Rules XXXI to XLVI, LIX, and LXI to LXVI.

65. General Order XXXVII.

66. See Equity Rules XXVIII to XXX. Compare *In re Hyde & Gload Mfg. Co.*, 4 Am. B. R. 602, 103 Fed. 617. See also "Amendment of Petition," in this Section, ante.

67. See Section Nineteen of this work, and for forms, "Supplementary Forms," post.

68. *Green River Dep. Bank v.*

*Craig Bros.*, 6 Am. B. R. 381, 110 Fed. 137.

69. *In re Taylor*, 4 Am. B. R. 515, 102 Fed. 728.

70. *Green River, etc., Bank v. Craig*, supra; *Leidigh Carriage Co. v. Stengel*, post; *In re Cliffe*, 2 Am. B. R. 317, 94 Fed. 354.

71. *Goldman v. Smith*, 1 Am. B. R. 266, 98 Fed. 182, and cases there cited.

72. *In re Paige*, 3 Am. B. R. 679, 99 Fed. 538. Compare *Hill v. Levy*, 3 Am. B. R. 374, 98 Fed. 94; *Leidigh Carriage Co. v. Stengel*, 2 Am. B. R. 383, 95 Fed. 637; *Bray v. Cobb*, 1 Am. B. R. 153, 91 Fed. 102.

72a. *Bradley Timber Co. v. White*, 10 Am. B. R. 329 (C. C. A.), 121 Fed. 779, affirming 9 Am. B. R. 441.

and, if it alleges jurisdictional defects, must result in a dismissal.<sup>73</sup> Where the answer is multifarious and in response to a multifarious petition, leave will be granted to amend and file as of the day the original petition was filed.<sup>74</sup> Useful precedents will be found in the numerous cases on equity rules and practice in the federal courts. Some of the defenses urged under the former law will be found in the foot-note.<sup>75</sup>

#### IV. Subs. c. VERIFICATION OF PLEADINGS.

**In General.**—Petitions and pleadings must be verified or affirmed before one of the officers designated in § 20. This requirement applies to specifications of objections to the discharge of a bankrupt.<sup>75a</sup> The verification of involuntary petitions is frequently attacked. Clearly, this subsection refers only to the verification of petitions and the pleas following the same. All pleadings setting up matters of fact must “be verified under oath.” By analogy to this requirement, district rules often also require petitions in a proceeding subsequent to the adjudication to be under oath. Under the former law, each of the petitioning creditors was obliged to verify,<sup>76</sup> and this is probably so now; but, in such a case, a motion to dismiss for want of jurisdiction<sup>77</sup> will be overruled, and opportunity given to supply the omission.<sup>78</sup> If before a notary public, where the venue does not appear, the verification is defective, but may be amended.<sup>79</sup> Where the petitioning creditor or pleader is a partnership, the oath should be by one of the partners, where a corporation, by an officer, in each case acquainted with the facts.

**Whether by Attorney.**—Here there is some conflict. The weight of authority is in favor of the proposition that an attorney in fact may verify the petition.<sup>80</sup> General Order IV requires no

<sup>73</sup>. In re Taylor, *supra*.

<sup>74</sup>. Mather v. Coe, 1 Am. B. R. 504, 92 Fed. 333. See also In re Ogles, 1 Am. B. R. 671.

<sup>75</sup>. In re Williams, *ante*; In re Skelley, Fed. Cas. 12,921; In re Cornwall, Fed. Cas. 3,250; In re Sheehan, Fed. Cas. 12,738; In re Derby, Fed. Cas. 3,815; In re Marvin, Fed. Cas. 9,150; In re Cal. P. R. Co., Fed. Cas. 2,315.

<sup>75a</sup>. In re Baerncopf, 9 Am. B. R. 133. See § 14, cl. a, *ante*, p. 172.

<sup>76</sup>. In re Rosenfields, Fed. Cas. 12,061; In re Simmons, Fed. Cas. 12,864.

<sup>77</sup>. Ex parte Jewett, Fed. Cas. 7,303.

<sup>78</sup>. Green River, etc. v. Craig, *supra*.

<sup>79</sup>. In re Brumelkamp, 2 Am. B. R. 318, 95 Fed. 814.

<sup>80</sup>. In re Vastbinder, 11 Am. B. R. 118, 126 Fed. 417; In re Hunt, 9 Am. B. R. 251, 118 Fed. 282; In re Herzkopf, 9 Am. B. R. 90, 118 Fed. 101. In re Simonson, 1 Am. B. R. 197, 92 Fed. 904, seems to be *contra*, though the exact question was not there at issue.

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other evidence of an attorney's authority than the fact of his admission to practice in the Circuit or District Court.<sup>80a</sup> The affidavit should be positive, based upon actual knowledge of the attorney.<sup>81</sup> A defect in the verification is not jurisdictional and answering on the merits waives it.<sup>82</sup> On the other hand, when the attorneys are more familiar with the facts than the petitioners, and the latter are nonresidents, a verification by the former will be sufficient.<sup>83</sup> A verification may be made before an attorney, as notary public, who is not yet the attorney of record of the affiant.<sup>84</sup> These same precedents apply to the verification of pleas subsequent to the petition.

#### V. Subs. d. TRIALS IN INVOLUNTARY CASES.

**Without a Jury:**—If the facts alleged in the petition are duly traversed by an answer, the judge must "determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury," unless a jury trial has been demanded.<sup>85</sup> The trial is brought on on the notice required by the practice of the district court in which the proceeding is, or under the district bankruptcy rules. Customarily, the consent of the court to setting the issue for trial on a day certain, other than during a regular term, is necessary. The burden of proof is on the petitioners, save, in certain circumstances, where the issue is solvency.<sup>86</sup> Thus, creditors must prove that their claims aggregate \$500 over securities, or an adjudication will be refused.<sup>87</sup> So, also, the proof must be confined to the acts of bankruptcy alleged in the petition,<sup>88</sup> though, it seems, if the evidence shows the commission of an act of bankruptcy not alleged, the court will usually allow an amendment.<sup>89</sup> On the other hand, where the proof shows domicile

80a. In re Herzikopf, 9 Am. B. R. 90, 118 Fed. 101.

81. In re Vastbinder, 11 Am. B. R. 118, 126 Fed. 417.

82. Leidigh Carriage Co. v. Stengel, ante; Simonson v. Sinsheimer, 95 Fed. 948, affirming s. c., 1 Am. B. R. 197, 92 Fed. 904; In re Herzikopf, 9 Am. B. R. 90, 118 Fed. 101.

83. In re Chequasset Lumber Co., 7 Am. B. R. 87, 112 Fed. 56.

84. In re Kindt, 3 Am. B. R. 443, 101 Fed. 107.

85. Note that jury trial can be demanded and had only when insolvency or the commission of the alleged act of bankruptcy is at issue; § 19-a, post.

86. See § 3-c-d.

87. In re West, 5 Am. B. R. 734.

88. In re Sykes, Fed. Cas. 13,708; Doan v. Compton, 2 N. B. R. 607.

89. In re Lange, 3 Am. B. R. 231, 97 Fed. 197; but for a limitation on this doctrine, see In re Sears, 8 Am. B. R. 713, 117 Fed. 294.

where domicile is not alleged, the petition will be considered amended in accordance with the proof.<sup>90</sup> The practice on the trial itself is like other civil trials in the federal courts, including the taking and reading of depositions.<sup>91</sup>

**By Jury.**— Jury trials are considered in detail under Section Nineteen of this work.

**Reference to Special Master.**— Where a jury trial is not demanded, it is customary to refer the issues raised by the pleadings to one of the referees, as a special master in chancery, to hear and report on the facts.<sup>92</sup> The powers of such a special master, his compensation, and the method of bringing on and conducting a trial before him are in all respects similar to that on like references on contested discharges.<sup>93</sup> The master's report is brought up either by exceptions or on motion to confirm,<sup>94</sup> and the judge then enters the order of adjudication or dismissal, in accordance as the facts shall warrant;<sup>95</sup> he is, of course, not bound to follow the master's conclusions.

**Adjudication or Dismissal.**— When a creditor's petition has once been filed, there must be either an adjudication or a dismissal.<sup>96</sup> If the former, the order is entered substantially as in Form No. 12. If the bankruptcy is that of a partnership and the individuals composing it, the form should be so changed as to amount to an adjudication of the partnership as such and of each member, all as distinct entities.<sup>97</sup> Under the former law, it was held that a mere memorandum of the adjudication was not sufficient.<sup>98</sup> An order must be entered and recorded. So, also, of the dismissal, which should be substantially in the words of Form No. 11. Both the

90. In re Elmira Steel Co., 5 Am. B. R. 484, 109 Fed. 456. Compare In re Stout, 6 Am. B. R. 505, 109 Fed. 794.

91. See § 21-b, R. S., §§ 861, 870; and observe Equity Rules LXVII to LXIX and LXXI.

92. For form see "Supplementary Forms," post.

93. See "Reference to Special Master," p. 174, ante; and observe Equity Rules LXXIII to LXXXIV.

94. See also "Supplementary Forms," post.

95. Clark v. Am. Mfg. Co., 4 Am. B. R. 351, 101 Fed. 962.

96. See, for remedy where adjudication has been dismissed, Neustadter v. Chicago, 3 Am. B. R. 96, 96 Fed. 830.

97. See pp. 73, 74, ante.

98. In re Boston, etc., Fed. Cas. 1,678; In re Hill, Fed. Cas. 6,484.

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statute and the General Orders provide for costs to the prevailing party.<sup>99</sup>

*Dismissals by Consent.*—This subject is also discussed elsewhere.<sup>100</sup> The broad rule of law is that, since every creditor has, once a petition is filed, the right to intervene, a petition should not be dismissed without notice to him.<sup>101</sup> It certainly cannot be dismissed without the consent of all the petitioning creditors.<sup>102</sup> Notice to other creditors is also required by the statute.<sup>103</sup> There are exceptions to the rule, as, where there are no estate, no claims proven, and no trustee appointed; though in such a case the petition is withdrawn, not dismissed.<sup>104</sup> It has been held that failure to notify creditors may not make the order a nullity.<sup>105</sup> The practice of omitting such notice is dangerous, however, and the courts will usually decline to grant dismissals, without proof of the names and addresses of creditors and due notice to them of the pending proceeding and the motion to dismiss.<sup>106</sup>

*Intervention by Other Creditors.*—This subject is considered at length elsewhere.<sup>107</sup> Any creditor may join in a petition already filed and pending, and, as a rule, at any time between the filing of the petition and the order of adjudication or dismissal.

**Vacating the Adjudication.**—An application to vacate the adjudication is unusual but, in given circumstances, proper.<sup>108</sup> The practice is not prescribed, but may be on petition or written motion and such notice as the court may order. It can be made only by the bankrupt<sup>109</sup> or a person who could have resisted the original peti-

99. § 3-e; General Order XXXIV.

100. See Sections Fifty-eight and Fifty-nine.

101. This also seems not to have been so under the former law. See *Ex parte Harris*, Fed. Cas. 6,110; *In re Gile*, Fed. Cas. 5,423.

102. *In re Cronin*, 3 Am. B. R. 552, 98 Fed. 584; *In re Lewis*, 11 Am. B. R. 683, 129 Fed. 147.

103. §§ 58-a (8), 59-g. For an order to show cause which is thought sufficient notice, see "Supplementary Forms," post.

104. *In re Hebbart*, 5 Am. B. R. 8, 104 Fed. 322.

105. *In re Jemison Mercantile Co.*, 7 Am. B. R. 588, 112 Fed. 966.

106. Where the alleged bankrupt's answer gives the names and addresses of his creditors in response to a petition alleging that they number less than twelve, such creditors should be notified of the motion to dismiss; here *In re Jemison*, etc., supra, cannot apply.

107. See under Section Fifty-nine. See also "Supplementary Forms," post.

108. *In re Ives*, 6 Am. B. R. 653, 111 Fed. 495; *In re De Forest*, Fed. Cas. 3,745.

109. See *In re Salaberry*, 5 Am. B. R. 847, 107 Fed. 95.

tion, in other words, by one who has a claim provable in the case.<sup>110</sup> But such an application must be made promptly,<sup>111</sup> and, being in the nature of a motion for a new trial, should rest on a showing of facts, on their face seeming to entitle the moving party to the relief. An adjudication will not be set aside where it was warranted by proof of an act of bankruptcy sufficiently alleged, although other acts were not properly pleaded or proved.<sup>111a</sup> The application must, of course, be made to the court that granted the order.<sup>112</sup> Adjudications cannot be attacked elsewhere.

#### VI. Subs. e, f. DEFAULTS.

**Where the Judge is in the District or Division.**— If no pleadings are filed on or before the last day for filing, the judge must “on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.” The last three words suggest that, in default cases, the judge is required to do more than grant the prayer of the petition; he must examine the petition and ascertain whether it alleges facts sufficient to bring it within the requirements of the statute; if not, he should dismiss it, notwithstanding the bankrupt’s default. Even if an answer is filed after the time to file it has expired, but before adjudication, an adjudication on default must be granted.<sup>113</sup> The presence of the judge on the next day after the time to plead expires, seems to make an immediate adjudication imperative. Otherwise, it must be as soon thereafter as practicable.

**Where the Judge is Absent.**— If the judge is not within the district or division the day after the time to plead expires, the clerk must “forthwith refer the case to the referee.” “Division of the district” here means the divisions into which some of the federal districts are divided by the general law, and not the referee districts.<sup>114</sup> This is done by an order of reference substantially in the words of Form No. 15. On its receipt, the functions and duties of

110. This follows necessarily from the definition of creditor, § 1 (9). This was not so under the law of 1867. See *In re Derby*, Fed. Cas. 3,815; *In re Bush*, Fed. Cas. 2,222.

111. *In re Ives*, 6 Am. B. R. 653, 111 Fed. 495; *In re Niagara Contracting Co.*, 11 Am. B. R. 643, 127 Fed. 782.

111a. *In re Lynan*, 11 Am. B. R. 466 (C. C. A.), 127 Fed. 123.

112. *Graham v. Boston, etc.*, 118 U. S. 161; *Chapman v. Brewer*, 114 U. S. 158; *In re Ives*, Fed. Cas. 7,115; *Lewis v. Sloan*, 68 N. C. 557.

113. *Bray v. Cobb*, 1 Am. B. R. 153, 91 Fed. 102; for effect of such adjudication, see *In re Am. Brewing Co.*, 7 Am. B. R. 463, 112 Fed. 752.

114. Compare *In re Polakoff*, 1 Am. B. R. 358.

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the judge as to making the adjudication or dismissing the petition devolve on the referee.<sup>115</sup>

## VII. Subs. g. VOLUNTARY CASES.

**In General.**—The practice here is the same as if the next day succeeding the last day to plead in an involuntary case had been reached.<sup>116</sup> The judge, if in the district or division, must adjudicate or dismiss; if he is absent, the clerk must forthwith refer the case to the referee, who then proceeds in the stead of the judge. It seems that an answer cannot be interposed to a voluntary petition.<sup>117</sup> The proper method of attack is by petition or motion to vacate.

*Voluntary Petition while Involuntary Petition Pending.*—There was some doubt under the former law whether a debtor, against whom a creditors' petition was pending, could be adjudicated on his voluntary petition subsequently filed;<sup>118</sup> and this, even though under that law, petitions could be dismissed by consent and without a general notice to creditors. The opposite now being the rule,<sup>119</sup> strictly speaking, such an adjudication is now neither proper nor lawful. The decisions are not uniform, however, and the tendency is to adjudicate on the voluntary petition and, by subsequent steps, protect the rights of the petitioning creditors flowing from their earlier petition.<sup>120</sup>

## VIII. MISCELLANEOUS.

**Effect of Adjudication.**—An adjudication confers jurisdiction both complete and exclusive, and *in rem* as well as *in personam*.<sup>121</sup> All persons named in the schedules as creditors are parties. So,

115. See in Section Thirty-eight of this work.

116. See last two paragraphs.

117. *In re Jehu*, 2 Am. B. R. 498, 94 Fed. 638.

118. *In re Flanagan*, Fed. Cas. 4,850; *In re Stewart*, Fed. Cas. 13,419; *In re Canfield*, Fed. Cas. 2,380. Compare *In re Mussey*, 3 Am. B. R. 592, 99 Fed. 71.

119. See p. 235, ante, and under Section Fifty-nine, post.

120. Thus it is still an open question whether an adjudication can be made on the voluntary petition at

once, reserving to the petitioning creditors the right to bring forward their proceeding and consolidate as of the date they filed (See *In re Stegar*, 7 Am. B. R. 665, 113 Fed. 978), or whether adjudication must be withheld until the notice is given (*In re Dwyer*, 7 Am. B. R. 532, 112 Fed. 777). The former seems the wiser practice. Otherwise great injury to assets may result from the delay. See also *In re Waxelbaum*, 3 Am. B. R. 392, 98 Fed. 589.

121. *Carter v. Hobbs*, 1 Am. B. R. 215, 92 Fed. 594.

also, are all persons in any way interested in the *res*.<sup>122</sup> An adjudication cannot be attacked for the first time on discharge by a creditor who had proceeded that far under it.<sup>123</sup>

**Order of Reference and Effect.**—If made after adjudication, the clerk uses Form No. 14;<sup>124</sup> but, it seems, such an order cannot be made by the deputy clerk.<sup>125</sup> This order and a copy of the petition and schedules in voluntary cases, and of the petition at least in involuntary cases, must be sent by mail or delivered personally by the clerk to the proper referee. The order fixes a day on which the bankrupt must appear, and after which the referee shall have jurisdiction. This should usually be the following day. It is thought, however, that the referee has complete jurisdiction the moment the order is made; Form No. 14, to this extent at least, is not in accord with the law. In effect the referee then becomes, as to that proceeding, a court of original jurisdiction,<sup>126</sup> and the judge a court of appeal.<sup>127</sup>

**Subsequent Proceedings.**—After reference to the referee, the practice on both voluntary and involuntary proceedings is identical, and is discussed under different Sections of this work.<sup>128</sup>

122. Carter v. Hobbs, *supra*.

123. In re Polakoff, *ante*; In re Mason, 3 Am. B. R. 599 (and footnote), 99 Fed. 256; In re Ordway, Fed. Cas. 10,552.

124. In re Bellamy, Fed. Cas. 1,268.

125. Bray v. Cobb, *ante*.

126. General Order XII. See also under Sections Thirty-eight and Thirty-nine.

127. See General Order XXVII.

128. For notice of first meeting and how given, see § 58; for proceedings at first meeting, see §§ 55, 56, General Orders IV, XXV; for proof of claims, see § 57, General Order

XXI; for appointment and qualification of trustees, see §§ 45, 46, General Orders XIII, XIV, XV, XVI; for bond of trustee and effect when certified copy recorded, see §§ 21-e, 50; for examination of the bankrupt, see §§ 7 (9), 21-a, General Order XXII; for setting aside of exemptions, see § 6, General Order XVII; for duties of trustee, see § 47, General Order XVII; for appointment of appraisers, see § 70-b; for sales of assets, see §§ 58-a (4), 70-b, General Order XVIII; for stays, see §§ 2 (15), 11; for declaration and payment of dividends, see § 65; for final meetings, see §§ 57-f, 58-a (6); etc.



## SECTION NINETEEN.

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### JURY TRIALS.

§ 19. **Jury Trials.**— *a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

*b* If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

*c* The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

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**Analogous provisions:** In U. S.: *As to jury trials in involuntary proceedings*, Act of 1867, §§ 41, 42, R. S., § 5026; Act of 1841, § 1; *As to jury trials upon specifications filed against a discharge*, Act of 1867, § 31, R. S., § 5111; Act of 1841, § 4; *As to trials of issues of fact in the District Court*, R. S., § 566; *As to trials of issues of fact in the Circuit Court*, R. S., §§ 648, 649.

In Eng.: Act of 1883, § 102 (3); General Rules 94-97.

**Cross references:** To the law: §§ 1 (15); 2; 3; 18; 21-b-c; 22; 23; 59; 60-b; 67-e.

To the General Orders: None.

To the Forms: No. 7.

## SYNOPSIS OF SECTION.

**I. Subs. a. Jury Trial in Contested Adjudications.**

Comparative Legislation.

Right of Jury Trial.

How Jury Trial Demanded.

Effect of Failure to Demand.

**II. Subs. b. How a Jury is Obtained.**

In General.

The Trial.

**III. Subs. c. Trial by Jury of Offenses and Other Controversies.**

Meaning of the Subsection.

Jury Trials on Contested Discharges.

**I. Subs. a. JURY TRIAL IN CONTESTED ADJUDICATIONS.**

**Comparative Legislation.**—In England, a jury trial in bankruptcy proceedings is always discretionary,<sup>1</sup> but, where the facts are disputed, will usually be granted.<sup>2</sup> Under the law of 1841, trial by jury could be demanded by the debtor within ten days after a decree adjudging him a bankrupt “to ascertain the facts of such bankruptcy.”<sup>3</sup> By the law of 1867, the demand must have been made in writing on the return day, and then the jury was “to ascertain the fact of such alleged bankruptcy.”<sup>4</sup> The new law clearly limits the issues to be submitted to a jury to two; (a) the question of insolvency and (b) whether the alleged act of bankruptcy has been committed.<sup>5</sup> It is not thought, however, that this precludes the jury from passing on any other pertinent question, as, whether the alleged bankrupt was domiciled within the district the required time, or whether a petitioning creditor has a provable debt, or whether the debtor is in one of the excepted classes not amenable to involuntary bankruptcy, provided the judge submits such an issue to them.<sup>6</sup> This subsection merely declares on what issues in a contested adjudication, trial by jury is a matter of right.

1. Act of 1883, § 102 (3).

2. *In re Carvill*, 1 *Morrell*, 150.

3. Act of 1841, § 1.

4. Act of 1867, § 41.

5. *Day v. Beck, etc., Co.*, 8 *Am. B. R.* 175. 114 *Fed.* 834; *In re**Christensen*, 4 *Am. B. R.* 99, 101 *Fed.* 802; *Simonson v. Sinsheimer*, 3 *Am. B. R.* 824, 100 *Fed.* 426.6. See *McNaughton v. Osgood*, 114 *N. Y.* 574; *McClure v. Gibbs*, 157 *N. Y.* 413.

Subs. a.]

Jury Trials in Contested Adjudications.

**Right of Jury Trial.**—The right to a jury trial in respect to the questions specified upon application of the person against whom an involuntary petition has been filed, as provided in this section, is absolute and cannot be withheld at the discretion of the court.<sup>6a</sup> In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted.<sup>6b</sup> Subsection a does not confer upon a petitioning or answering creditor the right to a trial by jury of an issue pertaining to alleged acts of bankruptcy or the insolvency of the alleged bankrupt.<sup>6c</sup> Upon motion the issues will be limited to the insolvency of the alleged bankrupt and the act of bankruptcy charged in the petition to have been committed.<sup>6d</sup>

**How Jury Trial Demanded.**—The demand must be by a written application. No form is prescribed,<sup>7</sup> but any statement signed by the bankrupt and indicating the demand will be sufficient. If the application is granted, an order substantially in Form No. 7 should be entered by the clerk. Such an application can be made only by "a person against whom an involuntary petition has been filed;" thus an answering creditor has not the right to a jury trial, even on the two specified questions.<sup>8</sup> The application must be made within five days after the return day. If there has been a general extension of time to plead, it seems that a demand filed after the original day to plead, but before the extension of time expires, will be too late.<sup>9</sup>

**Effect of Failure to Demand.**—It is clear that, if no application for a jury trial is filed within the time limited, it amounts to a waiver of the right. At the same time, it is not doubted that, even after such a waiver, an issue or issues of fact may be framed and sent to the jury, though the court in that event will not be bound by its

6a. *Elliott v. Toepner*, 9 Am. B. R. 50, 187 U. S. 327; *Day v. Beck & Gregg Hardware Co.*, 8 Am. B. R. 175 (C. C. A.), 114 Fed. 834.

6b. *Elliott v. Toepner*, 9 Am. B. R. 50, 187 U. S. 327. But see *Oil Well Supply Co. v. Hall*, 11 Am. B. R. 738 (C. C. A.), 128 Fed. 875, holding that where a district court certifies a case to the circuit court for trial by jury, after such a trial had been waived,

the verdict is advisory and may be disregarded.

6c. *In re Herzikopf*, 9 Am. B. R. 745 (C. C. A.), 121 Fed. 544.

6d. *Morss v. Franklin Coal Co.*, 11 Am. B. R. 423, 125 Fed. 998.

7. See, however, "Supplementary Forms," post.

8. See § 18-b.

9. Consult *Bray v. Cobb*, 1 Am. B. R. 153, 91 Fed. 102.

findings.<sup>10</sup> Where, however, the proceeding is only constructively involuntary, as some partnership proceedings, and the case has already been referred to the referee, the time does not expire until the day set for the hearing.<sup>11</sup>

## II. Subs. b. HOW A JURY IS OBTAINED.

**In General.**—As under the former law, perhaps before and certainly after the amendatory act of 1874,<sup>12</sup> the trial may be had at a stated term which has a jury in attendance, or before a special jury called for that purpose.<sup>13</sup> But the statute does not specify how such a special jury is to be paid, and this clause, in actual practice, will be found of little avail. The additional clause, permitting the certification of the cause to a circuit court, if such circuit court has or is to have a jury first in attendance, will usually make possible a seasonable jury trial. The requirement that it shall be in the same place as the district court is an unfortunate limitation in States of scattered population. It is unimportant in the large commercial centers, where a jury is frequently in attendance in either the district or the circuit court. By consent, however, the case may be certified to a circuit court sitting elsewhere in the district.

**The Trial.**—The trial before a jury is conducted and subject to the immemorial rules surrounding a trial at common law.<sup>14</sup> The right to introduce evidence by way of deposition is unquestioned,<sup>15</sup> and the method of taking evidence is further suggested by the Equity Rules.<sup>16</sup> The judge can take the case from the jury by directing a verdict, if no question of fact develops, or he can set the verdict aside.<sup>17</sup> If each party asks the court to direct a verdict in his favor, it is equivalent to a request for a finding of facts, and if the court directs the verdict, both parties are concluded on the find-

10. See cases cited in foot-note 6, supra.

11. In re Murray, 3 Am. B. R. 601, 96 Fed. 600.

12. See § 14 of Act of June 22, 1874. And consult In re Heydette, Fed. Cas. 6,444; In re Gebhardt, Fed. Cas. 5,294.

13. See, under the former law, In re Findlay, Fed. Cas. 4,789.

14. Elliott v. Toepfner, 187 U. S.

327, 9 Am. B. R. 54; Duncan v. Landis, 5 Am. B. R. 649, 106 Fed. 839.

15. See § 21-b. See also Ex parte Fisk, 113 U. S. 713.

16. Equity Rules LXVII-LXXI. As to burden of proof, see Brock v. Hoppock, Fed. Cas. 1,912; In re Scudder, Fed. Cas. 12,563; In re Oregon Printing Co., Fed. Cas. 10,560.

17. In re Jelsh, Fed. Cas. 7,257; In re Corse, Fed. Cas. 3,254.

## Subs. c.] Jury Trials of Offenses or Other Controversies.

ings of fact.<sup>17a</sup> As has already been suggested, he can submit issues to them, other than those peculiarly theirs to determine.<sup>18</sup> The verdict will usually be special,<sup>19</sup> and in the form of an answer to one or both the statutory issues raised in the case. The judge is, of course, bound by the jury's determination of questions of fact submitted to them in response to a demand as a matter of right.

## III. Subs. c. TRIAL BY JURY OF OFFENSES OR OTHER CONTROVERSIES.

**Meaning of the Subsection.**— It unquestionably refers to all issues that may arise in bankruptcy proceedings and as a part thereof, other than contested adjudications. The Seventh Amendment to the Constitution gives an absolute right to trial by jury in all actions at law where the amount in question exceeds twenty dollars. It has, therefore, been suggested that other issues which, were they not parts of a proceeding, as for instance, a motion to expunge a claim duly proved, would be mere actions at law, must, on demand of either party, be submitted to a jury.<sup>20</sup> *Barton v. Barbour*,<sup>21</sup> decided by the Supreme Court under the former law, seems, however, to be conclusive; it holds that trials without a jury in bankruptcy proceedings are not a violation of constitutional right. Nor does the reference to the Revised Statutes<sup>22</sup> made by this subsection change the rule. The district court does not try equity causes by jury; no more does the circuit court, in which, even in actions at law, a jury may be dispensed with by consent. Nor do the words "to submit matters in controversy, or an alleged offense under this act" become meaningless, in this view. Offenses, being crimes, must be tried by jury; actions to recover back property are clearly matters in controversy outside bankruptcy proceedings proper.<sup>23</sup> The words quoted clearly refer to these and like controversies, which are not strictly "proceedings in bankruptcy."<sup>24</sup> This would seem to be

17a. *Bradley Timber Co. v. White*, 10 Am. B. R. 329 (C. C. A.), 121 Fed. 779, affirming 9 Am. B. R. 441. See *Thompson v. Simpson*, 128 N. Y. 283; *Benttell v. McGone*, 157 U. S. 154.

18. In *re Rude*, 4 Am. B. R. 319, 101 Fed. 805.

19. Compare In *re King*, Fed. Cas. 7,782.

20. Compare In *re Christensen*, 4 Am. B. R. 99, 101 Fed. 802.

21. 104 U. S. 126.

22. See R. S., §§ 566, 648, 649.

23. Compare In *re Baudouine*, 3 Am. B. R. 651, 101 Fed. 574, reversing s. c., 3 Am. B. R. 55, 96 Fed. 536. And see In *re Russell*, 3 Am. B. R. 658, 101 Fed. 248.

24. For meaning of the words quoted, see *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163.

the test. Besides, "hearing" and "trial" are not in the present statute set off against each other.<sup>25</sup> The generic word "trial" is used in the present act as indicating a judicial determination of a controverted question, either without or with a jury. If, however, the action is to recover property fraudulently transferred and laid in either federal court, it is doubtful whether a jury trial can be had as matter of right. If not a part of the proceeding in bankruptcy, such a trial is certainly in equity. The judge could, however, frame an issue and submit it to the jury; and in many cases this will be done. Contempts are clearly not within this subsection, and they will be heard by the judge.<sup>26</sup>

**Jury Trials on Contested Discharges.**—What has gone before indicates that a bankrupt when petitioning for a discharge has not the right to demand a jury trial. This was otherwise under the former law.<sup>27</sup> The omission of the present law to give this right in very words is significant of an intention to deny it. No cases are yet to be found in the books. However, as previously suggested, the judge can, in his discretion, send a specified issue to a jury, and, when the objection to a discharge consists in an offense against the act, will often feel constrained so to do. In such cases he is, of course, not bound by the verdict.

<sup>25</sup>. Compare Act of 1867, § 41, R. S., § 5026, "upon such hearing or trial," with the use of the word "trial" alone in cases where a jury is clearly not intended, in §§ 13 and 15, Act of 1898.

<sup>26</sup>. *Ripon Knitting Works v. Schrieber*, 4 Am. B. R. 299, 101 Fed. 810.

<sup>27</sup>. See Act of 1867, § 31, R. S., § 5111; *Gordon v. Scott*, Fed. Cas. 5,620; *In re Lawson*, Fed. Cas. 8,151.

## SECTION TWENTY.

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### OATHS, AFFIRMATIONS.

§ 20. **Oaths, Affirmations.**— *a* Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

*b* Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

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**Analogous provisions:** In U. S.: *As to oaths to schedules and inventory*, Act of 1867, § 11, R. S., § 5017; *As to oaths to proofs of debt*, Act of 1867, § 22, R. S., §§ 5076, 5077, 5079, also § 5076A; Act of 1841, §§ 5, 7; *As to affirmations*, Act of 1867, § 48.

In Eng.: None.

**Cross references:** To the law: §§ 1 (17); 14-b; 18; 21; 29; 57; 59.

To the General Orders: None.

To the Forms: Generally, to each form requiring verification.

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### SYNOPSIS OF SECTION.

#### I. Oaths.

Comparison with Former Act.

How Oaths are Authenticated.

Oaths Before Attorneys of Record.

*Defects in Forms.*

#### II. Affirmations.

In General.

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#### I. OATHS.

**Comparison with Former Act.**— The present act is here much more liberal than its predecessor. Prior to the amendatory act of

1874, even proofs of claim could be sworn to only before a register or circuit court commissioner; if the oath was to the petition or inventory, it could also be sworn to before the judge. Now, an oath to any paper to be used in a bankruptcy proceeding can be taken before any officer authorized to administer oaths in proceedings in either the federal or state courts of the place where taken. This will in most States include, besides the judge, the referee, and the circuit court commissioners, notaries public, justices of the peace, commissioners of deeds, and civil magistrates in general. An oath taken before a notary public of one State, over his signature and seal, is sufficient for use in proceedings in another State.<sup>1</sup> If in foreign countries, it must be before a diplomatic or consular officer of the United States there resident; an oath before a foreign local magistrate will not be sufficient.

**How Oaths are Authenticated.**—If the officer taking the oath has a seal, he should impress it in the paper.<sup>1a</sup> If not, the better practice is to secure a certificate from some clerk of a court of record, that he is such an officer. It is not thought, however, that such certificates are necessary, other than to the effect that in the State where taken the officer is authorized to administer oaths in proceedings before its courts. No certificate is, therefore, necessary when the claim is to be filed in the State within which it is verified; the referee should take judicial cognizance of the fact that the officer was so authorized.<sup>2</sup> But powers of attorney can be acknowledged only before a referee, a circuit court commissioner, or a notary public.<sup>3</sup>

**Oaths Before Attorneys of Record.**—Under the former act, proofs of debt could not properly be taken before the claimant's attorney of record.<sup>4</sup> This, it seems, is not so now,<sup>5</sup> unless the attorney has previously filed an appearance.<sup>6</sup> A proof is nothing more than an affidavit, and, while amounting to a *prima facie* case,<sup>7</sup> when filed, is not evidence on a motion or petition to expunge. The better

1. In re Pancoast, 12 Am. B. R. 275, 129 Fed. 643.

1a. In re Nebe, Fed. Cas. 10,073. Compare In re Phillips, Fed. Cas. 11,098.

2. In re Merrick, Fed. Cas. 9,463.

3. See General Order XXI (5). Compare In re Sugenhimer, 1 Am. B. R. 425, 91 Fed. 744.

4. In re Keyser, Fed. Cas. 7,748; In re Nebe, *supra*.

5. In re Kimball, 4 Am. B. R. 144, 100 Fed. 177.

6. In re Kindt, 3 Am. B. R. 443, 98 Fed. 403.

7. In re Sumner, 4 Am. B. R. 123, 101 Fed. 224.



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practice, however, is to see that a petition is sworn to or a claim is verified before some one other than the claimant's attorney.<sup>8</sup>

*Defects in Forms.*—The Forms are in this particular frequently misleading. Several seem to indicate that they must be sworn to before the referee. The oaths to the schedules<sup>9</sup> are either unnecessary, or, if not so, ought to have a jurat similar to the oaths to the petition. But, where possible, the forms of oaths prescribed should be followed.<sup>10</sup>

## II. AFFIRMATIONS.

**In General.**—The words of this subsection require no discussion. The word "oath" includes "affirmation" wherever used in the statute.<sup>11</sup>

8. Thus, note In re Brumelkamp,  
2 Am. B. R. 318, 95 Fed. 814.

9. See Form No. 1.

10. In re Keeler, Fed. Cas. 7,638.

11. See § 1 (17).

## SECTION TWENTY-ONE.

### EVIDENCE.

§ 21. **Evidence.**— *a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt<sup>1</sup> and his wife,\* to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: *Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.\**

*b* The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

*c* Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

*d* Certified copies of proceedings before a referee, or of papers when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

*e* A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

*f* A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not re-

1. The words "who is a competent witness under the laws of the State in which the proceedings are pending" which occurred here in the original law, were stricken out by the amendatory act of 1903.

\*Amendments of 1903 in italics.

## § 21.]

## Analogous Provisions; Synopsis of Section.

voked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

**Analogous provisions:** In U. S.: *As to examinations of third parties*, Act of 1867, §§ 22, 26, R. S., §§ 5081, 5087; Act of 1800, §§ 14, 15; *As to depositions, etc.*, Act of 1867, §§ 5, 7, 38, R. S., §§ 5003, 5004, 5005, 5006; Act of 1841, § 7; Act of 1800, §§ 14, 15; *As to certified copies as evidence*, Act of 1867, § 38, R. S., § 4992; *As to effect of and purpose of recording certified copy of bond*, Act of 1867, § 14, R. S., §§ 5044, 5054; Act of 1800, § 11; *As to certified copy of order of discharge as evidence etc.*, Act of 1867, § 34, R. S., § 5119.

In Eng.: *As to examination of third parties*, Act of 1883, § 27. See also General Rules 61-72.

**Cross references:** To the law: §§ 1 (4) (5) (9) (18); 2 (15); 7 (9); 12; 14-b; 17; 20; 38 (2) (4) (5); 39 (5) (9); 41; 47-c; 50-b; 58-a (1); 70-a-f.

To the General Orders: IV, X, XII (1), XXII, XXXV.

To the Forms: Nos. 26, 28, 29, 30, 59, 62.

## SYNOPSIS OF SECTION.

**I. Subs. a. Compulsory Examination.**

Comparative Legislation.

Scope of Subsection.

Who May, and When to, Apply.

Who May be Examined.

*Amendments of 1903.*

*Wife of the Bankrupt as a Witness.*

*Right to Counsel.*

Scope of Examination.

Privileged Communications.

Criminating Questions.

Practice.

Use of Examination in Proceedings in Other Courts.

**II. Depositions.**

Subs. b. In General.

Subs. c. Notice to Adverse Party.

*Practice.*

**III. Certified Copies as Evidence.**

Subs. d. In General.

Subs. e. Of Order Approving the Trustee's Bond.

Subs. f. Of Order on Discharge or Composition.

Subs. g. Of Order Confirming Composition, as Evidence of the Revesting of Bankrupt's Property.

**I. Subs. a. COMPULSORY EXAMINATION.**

**Comparative Legislation.**—The English statute is here almost identical with our own;<sup>2</sup> in addition to other designated persons, the court may summon for examination any person deemed "capable of giving information respecting the debtor, his dealing or property," and the scope, method, and effect of examinations is prescribed and regulated by the General Rules.<sup>3</sup> All previous laws in this country have provided for the examination of third parties, in aid of administration.<sup>4</sup> The law of 1867 did so in different words, but much to the same effect.<sup>5</sup> Cases then decided will be found useful precedents now.<sup>6</sup>

**Scope of Subsection.**—It should be noted, however, that, while this subsection makes the bankrupt a compulsory witness as to his own "acts, conduct, or property," by § 7 (9), he must also appear and be ready to testify concerning the same things at the first meeting of creditors. His examination at that time is considered elsewhere;<sup>7</sup> and whatever is there said will apply equally to an examination of a bankrupt under this subsection. In effect, the only difference, so far as the examination of the bankrupt goes, is one of practice. Where first meetings are kept alive by continuances, as is customary, his examination can be had or resumed so long as the meeting lasts. If the meeting has been adjourned, an examination of the bankrupt can, under § 7 (9), still be had "at such times as the court shall order," or it can be required under the subsection now discussed. Clearly, therefore, the main purpose of § 21-a is to authorize and regulate the examinations of third parties, rather

<sup>2</sup>. Act of 1883, § 27.<sup>3</sup>. General Rules 61-72.<sup>4</sup>. Compare "Analogous Provisions," ante.<sup>5</sup>. See same.<sup>6</sup>. See foot-notes under appropriate captions, post.<sup>7</sup>. Note discussion in Section Seven, ante.

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Application; Who May be Examined.

than of the bankrupt. Without the power so to examine, the remedy of the statute against preferences and fraudulent transfers would often be unavailing. The issuance of an order directing the examination of a third person concerning the bankrupt estate is within the discretion of the court.<sup>8</sup>

**Who May, and When to, Apply.**—Here the present law is somewhat broader than its predecessor.<sup>9</sup> The bankrupt, a creditor, or any officer may apply.<sup>10</sup> "Officer" has been held to include a receiver.<sup>11</sup> Even a creditor<sup>12</sup> whose claim has not yet been presented may apply. While the present law does not in words authorize the court to proceed *proprio motu*, as did that of 1867, the general powers conferred on it by § 2 (15) seem to imply such an authority. Being in aid of administration only,<sup>13</sup> an examination of third persons should not be asked after the estate is wound up, and, it has been held, a pending accepted composition is a sufficient closing of the estate to warrant a refusal if application is then made;<sup>14</sup> in such a case, the witnesses can usually be summoned and examined in the composition proceeding.<sup>15</sup>

**Who May be Examined.**—Subject to the limitations on the scope of the examination and the usual privileges of witnesses from answering certain classes of questions, any designated person may be subpoenaed and examined in a bankruptcy proceeding.<sup>16</sup> It has even been held that a person liable to suit at the instance of a trustee may be compelled to testify.<sup>17</sup> Where, however, the purpose is palpable to drag out evidence for use against the third party witness in another court, the examination will be kept within proper bounds. Refusal to appear, under the former statute, made the recusant witness liable in contempt.<sup>18</sup> As to contempts of this

8. In re Andrews, 12 Am. B. R. 267, 130 Fed. 383.

9. Where claims were being investigated, under the former law only the bankrupt, a creditor, or the assignee could apply (§ 22), though the court could itself require the attendance of any person (§ 26).

10. Compare, for statutory definition of "officer," § 1 (18).

11. In re Fixen, 2 Am. B. R. 822, 96 Fed. 748.

12. See § 1 (9), and consult In re Walker, 3 Am. B. R. 35, 96 Fed. 550; In re Jehu, 2 Am. B. R. 498, 94 Fed.

638. Compare, however, In re Ray, Fed. Cas. 11,589, under former law.

13. In re Cobb, 7 Am. B. R. 104.

14. In re Tift, Fed. Cas. 14,032.

15. See In re Ash, Fed. Cas. 571. And compare In re Sumner, 4 Am. B. R. 123, 101 Fed. 224.

16. Even a trustee in an insolvency proceeding more than four months before the bankruptcy; In re Purcell, 8 Am. B. R. 96, 114 Fed. 371. See also People's Bank v. Brown, 7 Am. B. R. 475, 112 Fed. 652.

17. In re Cliffe, 3 Am. B. R. 257, 97 Fed. 540.

18. Act of 1867, § 7.

character, the present act does not particularize; but the court has power to enforce its commands in the usual way.<sup>19</sup>

*Amendments of 1903.*—The broad terms of the original law have been made even broader by the amendatory act of 1903. Formerly, a witness not competent “under the laws of the State in which the proceedings are pending” could not be compelled to testify in the court of bankruptcy. This limitation has been stricken out;<sup>20</sup> but the change is important only in those States where a wife is not a compellable witness for or against her husband.

*Wife of the Bankrupt as a Witness.*—The change just referred to in effect restores the rule under the law of 1867, which made the wife of a bankrupt a compellable witness in all States;<sup>21</sup> but with a proviso which limits such an examination to “business transactions.” This limitation is probably operative even in States where a wife may be a witness for or against her husband. Thus while there is no statutory limitation on the examination of the husband of a bankrupt wife, where the former is the bankrupt the latter can be forced to testify only as to business transactions with the husband, or to determine the fact whether she has been a party to such transactions. In many cases, the wife is the only witness, the bankrupt being protected by his privilege, who can shed light on the whereabouts of secreted assets. Yet, in some States, as the law was, she, too, could claim a privilege.<sup>22</sup> This is no longer so. Congress has added the words “and his wife” after “bankrupt” in this clause, and supplemented them with the proviso clause above referred to. Thus, most of the cases cited just *supra* are no longer in point. Whether a creditor<sup>23</sup> or not, the wife of the bankrupt may now be asked any questions as to business transactions with her husband which might be put to any other third-party witness, and, on refusal, is liable to the same penalties. A certain degree of latitude in the wife’s examination will be allowed so that the court may be sure that she is not, and has not been transacting business as a mere cover for the bankrupt, or in aid of a scheme to injure his creditors.<sup>23a</sup>

19. §§ 1 (13) (16); 41-b.

20. The exact words dropped out after the words “including the bankrupt” are indicated in foot-note 1.

21. § 26, R. S., § 5088. See *In re Campbell*, Fed. Cas. 2,348; *In re Craig*, Fed. Cas. 3,323; *In re Anderson*, 23 Fed. 482.

22. *In re Fowler*, 1 Am. B. R. 555,

93 Fed. 417; *In re Jefferson*, 3 Am. B. R. 174, 96 Fed. 826; *In re Mayer*, 3 Am. B. R. 222, 97 Fed. 328; *In re Cohn*, 5 Am. B. R. 16, 104 Fed. 328.

23. Compare *In re Richards*, Fed. Cas. 11,770. And see *In re Post*, 1 N. B. N. 527.

23a. *In re Worrell*, 10 Am. B. R. 744, 125 Fed. 159.

*Right to Counsel.*—It has been uniformly held under both statutes that the examination referred to here is not of such a character as to entitle the witness to counsel as a matter of right.<sup>24</sup> But the attendance and assistance of counsel will not usually be refused, especially where it appears that the examination tends to show the commission of a crime. Yet, even if in attendance, the right of the witness' counsel to cross-examine seems in the discretion of the court.<sup>25</sup>

*Scope of Examination.*—This is indicated by the words "the acts, conduct, or property of a bankrupt." Yet, as a rule, great latitude will be allowed.<sup>26</sup> But, when a witness has clearly indicated that the matter inquired into has nothing to do with the bankrupt's acts, conduct, or property, his examination on that matter should be stopped.<sup>27</sup> A difficult problem often arises when the questions seem directed to the private affairs or individual property of a third-party witness. No rigid rule can be stated. If the acts inquired of are interwoven with those of the bankrupt in such a way as to cause a reasonable suspicion that the witness has been preferred or is colluding with the debtor to secrete property, the witness will be required to answer and even to produce his own books.<sup>28</sup> If, on the other hand, the examination does not develop facts warranting these inferences or seems without sufficient foundation, questions concerning the property or conduct of the witness will be ruled out.<sup>29</sup> There is no backward limit as to the time of the acts or the ownership of property under investigation;<sup>30</sup> the further back the questioner goes, however, the narrower should be the limits of the examination. The date the petition was filed is usually the forward limit; what a bankrupt does or earns or has after that date is not the concern of his creditors, so long as the doing, earning, or having is consistent with honest dealing prior to the bankruptcy.<sup>31</sup>

<sup>24</sup>. In re Cobb, 7 Am. B. R. 104; In re Howard, 2 Am. B. R. 582, 95 Fed. 415; In re Comstock, Fed. Cas. 3,080; Matter of Abbey Press (C. C. A.), 13 Am. B. R. 11.

<sup>25</sup>. In re Cobb, ante, and the cases cited.

<sup>26</sup>. In re Horgan, 3 Am. B. R. 253, 98 Fed. 414, affirming s. c., 97 Fed. 319. Compare also In re Foerst, 1 Am. B. R. 259, 93 Fed. 109; In re Pittner, 2 N. B. N. Rep. 915.

<sup>27</sup>. In re Carley, 5 Am. B. R. 554, 106 Fed. 862.

<sup>28</sup>. In re Fixen, ante; People's Bank v. Brown, ante.

<sup>29</sup>. In re Hayden, 1 Am. B. R. 670, 96 Fed. 199; In re Salkey, Fed. Cas. 12,252.

<sup>30</sup>. In re Brundage, 4 Am. B. R. 47, 100 Fed. 613.

<sup>31</sup>. See In re Walton, 1 N. B. N. 533.

**Privileged Communications.**—Here the statute is silent. It is not thought, however, that the elimination of the words making competency depend on the laws of the several States, accomplished by the amendatory act of 1903, has affected the privilege of any witness other than the bankrupt's wife. Public policy commands the recognition of well-known exemptions on compulsory testimony. In the absence of controlling words in the statute, the state law as to privilege will doubtless be followed. Interesting cases under the former law will be found in the foot-note.<sup>32</sup>

**Criminating Questions.**—Here also the statute is silent. Early in the administration of the law, it was thought that a bankrupt waived his constitutional privilege by filing a voluntary petition, and that the opposite was the rule where the petition was involuntary.<sup>33</sup> As has been seen elsewhere,<sup>34</sup> this idea has been exploded. Any bankrupt can refuse to answer a question on the ground that it will tend to incriminate him.<sup>34a</sup> Much more, then, is a third-party witness entitled to his constitutional privilege; the law does not even attempt to give him immunity from punishment. He can, therefore, refuse to testify on this ground. The numerous cases construing the Fifth Amendment will be found valuable precedents.<sup>35</sup>

**Practice.**—The practice on third-party examinations is not essentially different from that on examinations of the bankrupt at first meetings.<sup>36</sup> Application may be by petition or an informal motion. Grounds for the order, though not absolutely essential, will usually be required.<sup>37</sup> If the case is pending before a referee, the application should be made to him; he has the same power as the judge to require a designated person to appear and testify.<sup>38</sup> If the witness is present, he may be ordered to testify; if not present, he should be brought in on a subpoena,<sup>39</sup> and, if books or docu-

32. In re Aspinwall, Fed. Cas. 591; In re Bellis, 38 How. Pr. (N. Y.) 79.

33. Compare In re Sapiro, 1 Am. B. R. 296. Contra, In re Hathorn, 2 Am. B. R. 298, and In re Scott, 1 Am. B. R. 49, 95 Fed. 815.

34. See p. 115, ante, and cases cited.

34a. Matter of Kanter & Cohen, 9 Am. B. R. 104, 117 Fed. 356.

35. For instance, Counselman v. Hitchcock, 142 U. S. 547, and Brown

v. Walker, 161 U. S. 591, and the cases there cited.

36. See pp. 112-115, ante.

37. In re Howard, ante; In re Earle, Fed. Cas. 4,244; In re Mendenhall, Fed. Cas. 9,423; In re Lanier, Fed. Cas. 8,070.

38. § 38 (2) (4); Matter of Abbey Press, 13 Am. B. R. 11. See also Form No. 28.

39. As to the territorial effect of a subpoena, see In re Hemstreet, 8 Am. B. R. 760, 117 Fed. 568.



Subs. a, b.]

Depositions.

ments are desired, a subpoena *duces tecum* can be issued; or, it seems, the witness can be brought in on a simple order.<sup>40</sup> But such an examination need not be at a meeting of creditors; nor need creditors or the bankrupt be notified.<sup>41</sup> Frequently, indeed, it will be advisable even to have it in the absence of the bankrupt and the general creditors. The practice on the taking of testimony is regulated by General Order XXII, which is discussed elsewhere.<sup>42</sup>

**Use of Examination in Proceedings in Other Courts.**—This is a mooted question. It can, of course, be used for purposes of impeachment. If admitted for any other purpose, it should be proven by calling the stenographer, or by offering a certified copy of the record.<sup>43</sup> The examination is so nearly like an *ex parte* inquisition, however, that it will often be ruled out, and, if allowed, should be accompanied with permission to the other party to cross-examine. It seems that the examination of third-party witnesses cannot be introduced on the objections to the bankrupt's discharge, though his examination may be,<sup>44</sup> and testimony taken upon such an examination is inadmissible in a proceeding to compel the payment of money alleged to belong to the bankrupt estate.<sup>44a</sup> Some cases on analogous points will be found in the foot-note.<sup>45</sup>

## II. DEPOSITIONS.

**Subs. b. In General.**—While a subpoena may, within certain territorial limits, be effective outside the district of its issue,<sup>46</sup> depositions are the usual means of securing testimony at a distance greater than one hundred miles.<sup>47</sup> It is customary, and will usually

40. For form of order, see Form No. 28, and for subpoena, see Form No. 30. It is customary for referees to keep subpoenas signed by the clerk on hand. By analogy to Equity Rule XV, such subpoenas should be served either by the marshal, or by some person designated by the referee. The witness fee is \$1.50 and eight cents a mile one way. Proof of service is made by a return, if service is by the marshal; by affidavit (Form 30), if by a designated person.  
41. Compare *In re Macintire*, Fed. Cas. 8,821.

42. See pp. 113-115, ante. See also Form No. 29.

43. See "Certified Copies as Evidence," post.

44. *In re Wilcox*, 6 Am. B. R. 362, 109 Fed. 628; in effect reversing *In re Cooke*, 5 Am. B. R. 434, 109 Fed. 631. Consult, as to the bankrupt's examination being used, cases cited on pp. 113-115, ante.

44a. *In re Alphin & Lake Cotton Co.*, 12 Am. B. R. 653.

45. *In re Shaw*, 6 Am. B. R. 499, 109 Fed. 780; *In re Keller*, 6 Am. B. R. 335, 109 Fed. 118; *In re Alphin & Lake Cotton Co.*, 12 Am. B. R. 653.

46. See R. S., § 876; *In re Woodward*, Fed. Cas. 18,000.

47. See R. S., §§ 858-879; *Ex parte Fisk*, 113 U. S. 713; *In re Hemstreet*, 8 Am. B. R. 760, 117 Fed. 568.

be found desirable, to have the deposition taken before the referee of the domicile of the witness. The method by deposition does not, of course, exclude the more formal method of a commission to take testimony with or without interrogatories, as regulated by Equity Rule LXVII. Cases construing both the Revised Statutes and the Equity Rules in other courts than courts of bankruptcy will be found in point.

**Subs. c. Notice to Adverse Party.**—If the evidence is to be taken by deposition, notice must in all cases be filed with the referee. But, it seems, in the absence of any statutory regulation to the contrary, no notice need be given the opposing party, unless the evidence is to be offered in opposition to a creditor's claim or the bankrupt's discharge.

*Practice.*—Here the general law controls. The practice on depositions in admiralty will be found a safe guide.<sup>48</sup>

### III. CERTIFIED COPIES AS EVIDENCE.

**Subs. d. In General.**—The purpose of subsections d, e, f, and g, is manifestly to give to the records of referees when offered in evidence the same force as the records of the district court proper. It is thought that the clause "when issued by the clerk or referee" refers to the word "papers" and not to prior words of the clause; the clerk often acts in the absence of the district judge. The certificate may be signed either by the clerk or the referee; but the safer practice is to secure the signature of the former, which carries with it the seal of the court. In important districts, the referee usually has a clerk, but the latter is not an officer recognized by the law, and a certificate by him would be unavailing.<sup>49</sup>

**Subs. e. Of the Order Approving the Trustee's Bond.**—Under the former law, the register, as soon as the assignee was appointed, by an instrument in writing equivalent to both a deed and a bill of sale, transferred all the assets of the bankrupt to the assignee;<sup>50</sup> this assignment was recorded in the district court clerk's office,<sup>51</sup> and a certified copy could then be recorded in the record office

<sup>48</sup>. See Benedict's Admiralty, and observe the various district court rules. See also R. S., § 863 et seq.

<sup>49</sup>. Compare § 1 (5).

<sup>50</sup>. § 14, R. S., §§ 5044, 5054.

<sup>51</sup>. In re Neale, Fed. Cas. 10,066.

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 Subs. e, f, g.] Miscellaneous Certified Copies as Evidence.
 

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of the State. Under the present law, there is no such instrument, but a certified copy of the order approving the trustee's bond, when recorded in the proper clerk's or register's office, becomes constructive notice, and operates as would a deed and bill of sale by the bankrupt. It is also made conclusive evidence of the vesting of the title in the trustee. It is wise, therefore, to record such a certified copy in the proper record office where any property of the bankrupt may be situated. This provision was clearly overlooked by the Senate Judiciary Committee, when it added § 47-c to the Ray bill. Though the trustee is now required to record a certified copy of the adjudication of bankruptcy in each case, its effect as public notice is not fixed. Safe practice will suggest the recording of both instruments. As title passes to the bankrupt's property at the date of the adjudication as of the date the petition is filed,<sup>52</sup> the order approving the bond should show these dates, to the end that, when the certified copy is recorded, searchers and title companies may ascertain therefrom the time of devolution of title and what property passed; though this is not so necessary since § 47-c was added by the amendatory act of 1903. This may be accomplished by inserting in Form No. 26, after the word "bankrupt," the words: "who was so adjudged by this court on the . . . . day of . . . . ., 190., on a petition filed on the . . . . day of . . . . ., 190..."<sup>53</sup>

**Subs. f. Of Order on Discharge or Composition.**—The effect of these certified copies is clearly defined in this subsection, and has been referred to elsewhere.

**Subs. g. Of Order Confirming Composition, as Evidence of the Re-vesting of the Bankrupt's Property.**—Here also no comment is needed. The words used indicate the effect of such an order and of its record. It also is referred to elsewhere.

<sup>52</sup>. Thus, by § 70-a.

bond in "Supplementary Forms,"

<sup>53</sup>. See form for order approving post.

## SECTION TWENTY-TWO.

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### REFERENCE OF CASES AFTER ADJUDICATION.

§ 22. **Reference of Cases after Adjudication.**—*a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

*b* The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

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**Analogous provisions:** In U. S.: *As to one referee acting in the place of another*, Act of 1867, § 4, R. S., § 5007.

In Eng.: None.

**Cross references:** To the law: §§ 2 (7) (10); 18; 38; 39; 44; 47; and generally, to all sections of the law regulating the administration of a bankrupt's estate.

**To the General Orders:** XII, XIII, XV, XVII, and generally, to those referring to administration only.

**To the Forms:** Nos. 14, 15, 22, 23, 27, and, generally, to those having to do with administration.

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### SYNOPSIS OF SECTION.

#### I. Subs. a. References after Adjudication.

Administration without a Reference.

General References.

§ 22.]

General References; Limited References, etc.

**I. Subs. a. References after Adjudication — Continued.****Limited References.**

To any Referee of the Jurisdiction.

**II. Subs. b. Transfer of Cases from one Referee to Another.**

Reasons for Transfers.

**I. Subs. a. REFERENCES AFTER ADJUDICATION.**

**Administration without a Reference.**— By the terms of this section a bankrupt's estate may be administered under the direct supervision of the judge, and without an order of reference. In such a case, a meeting of creditors would first be called, the clerk giving the notices and, after the election of the trustee, the case would proceed in the usual way. There is, however, no record of a case where the judge has kept an administration in his own control.

**General References.**— These are the references familiar to the bar and the courts. They are accomplished by the entry of an order, substantially in the words of Form 14. The portion of the order which requires the bankrupt to attend before the referee on a day certain follows General Order XII (1), and is in accord with the practice under the former law.<sup>1</sup> The effect of this order and the practice under it are discussed elsewhere.

**Limited References.**— These are not the same as the familiar references to the referees as special masters. It is somewhat difficult to conceive of a case where a limited reference would be ordered.

**To any Referee of the Jurisdiction.**— The judge is not bound to refer the case to the referee whose district includes the bankrupt's domicile. Thus, cases often arise where a majority of creditors reside in one referee district and the bankrupt in another. It would then be clearly "for the convenience of parties in interest" to refer the case to the referee where the creditors reside. So, also, when a referee is disqualified,<sup>2</sup> as by being the attorney for the bankrupt or by relationship, the reference will be ordered elsewhere "for cause." Likewise, if, in the words of the statute, "the

1. See General Order IV, Act of 1867.

2. See "Supplementary Forms" for form of certificate of disqualification.

## Transfers from One Referee to Another.

[§ 22.]

bankrupt does not do business, reside or have his domicile in the district." The only real limitations as to the personnel of the referee then seem to be that he must be (a) a duly appointed referee in bankruptcy, and (b) of the same jurisdiction as the court.

## II. Subs. b. TRANSFER OF CASES FROM ONE REFEREE TO ANOTHER.

**Reasons for Transfers.**—Transfers are often necessary. The reasons prescribed are (a) for the convenience of parties, and (b) for cause. The death or resignation of the referee would be sufficient cause; so would the appointment of another in his stead; so also would be official misconduct on his part.<sup>3</sup> The power to transfer a case from one referee to another is absolute and discretionary. If exercised, the referee is entitled to a part only of his fees and commissions, the proportion to be fixed by the judge.<sup>4</sup>

3. See *In re Smith*, Fed. Cas. 4. § 40-b.  
12,971.

## SECTION TWENTY-THREE.

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### JURISDICTION OF UNITED STATES AND STATE COURTS.

➤ § 23. Jurisdiction of United States and State Courts.—*a* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

*b* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.\**

*c* The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

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**Analogous provisions:** In U. S.: Act of 1867, § 1 and § 2 (as amended by Act of June 24, 1874), R. S., §§ 4972, 4979; Act of 1841, § 8.

**In Eng.:** None.

**Cross references:** To the law: §§ 1 (8); 2 (7) (15); 3-e; 11; 18; 19; 21; 60-b; 67-e; 69.

**To the General Orders:** None.

**To the Forms:** None.

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### SYNOPSIS OF SECTION.

#### I. Scope of Section.

Meaning of, and Practice under it.

Comparative Legislation and Decisions.

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\*Amendment of 1903 in italics.

**II. Subs. a. Jurisdiction of the Circuit Courts.**

The Same as Fixed by General Law.

**III. Subs. b. Jurisdiction of District Courts.**

Comparative Legislation.

"Bardes v. Bank".

Amendment of 1903.

*Effect of Amendment.*

Summary Jurisdiction.

*Illustrative Cases.*

*Effect of Amendment of 1903.*

Effect on Auxiliary Remedies.

Jurisdiction of State Courts.

**IV. Subs. c. Concurrent Jurisdiction of Circuit Court Over Offenses.**  
Meaning and Scope.

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I. SCOPE OF SECTION.

**Meaning of and Practice under it.**—Ever since *Ex parte Christy*,<sup>1</sup> the questions suggested by this section have led to discussions in Congress and confusion in the courts. There is, of course, no analogous section in the English law; the anomalous co-ordinate national and state courts there being impossible. The books are filled with opinions construing the corresponding sections of the law of 1867.<sup>2</sup> So many cases have already been decided under the law of 1898, and they are often so antagonistic, that the task of the commentator would be hopeless, had not the Supreme Court illumined the situation with a few decisions of great importance. Some are, since the amendatory act of 1903, no longer the law; but even these are at least suggestive of other doctrines as to those provisional and summary remedies which are vital to a due and orderly administration in bankruptcy. The section, other than its last subsection, has to do only with suits at law or in equity outside the bankruptcy proceeding proper;<sup>3</sup> subsection b only with suits by, not against, the trustee.<sup>4</sup> Practice under § 23 is, therefore, regulated, not by the General Orders and Forms, but, if in equity, by the Equity Rules, if in law, by the state procedure as

1. 3 How. 314.

2. See Cent. Dig., Vol. 6, "Bankruptcy," §§ 410-417; but observe that many of the cases cited are not now in point.

3. See *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163.

4. In re *McCallum*, 7 Am. B. R. 596, 113 Fed. 393.



Subs. a.] Comparative Legislation; Circuit Courts.

supplemented or modified by federal rules applicable to such cases.

**Comparative Legislation and Decisions.**—This subject is exhaustively treated by Mr. Justice Gray in *Bardes v. Bank*.<sup>5</sup> The former law gave concurrent jurisdiction to the circuit and district courts of both law and equity actions, as distinguished from proceedings in bankruptcy *per se*, where the assignee (trustee) was plaintiff or defendant.<sup>6</sup> It was also in the end settled that the statute meant that, when the holding of a third party against the assignee (trustee) was adverse, a summary remedy within the bankruptcy proceeding was not proper, but resort must be had to a plenary suit.<sup>7</sup> The law of 1898, as originally enacted, evidenced an intention to transfer all controversies, other than those strictly within the bankruptcy procedure (as, for instance, a contest on a proof of debt), to the state tribunals. Such was the purpose as indicated by the debates in Congress accompanying its passage,<sup>8</sup> and such seems the literal meaning of the words. The amendatory act of 1903 has, however, re-enacted the doctrine of concurrent jurisdiction, at least as to all suits by the trustee to recover property fraudulently or preferentially transferred or incumbered within the four-month period. Little reference will, therefore, be made in what follows to the decisions, other than those of the court of last resort. The student or investigator will find summaries of the conflicting opinions from time to time in the reports of the period.<sup>9</sup>

## II. Subs. a. JURISDICTION OF THE CIRCUIT COURTS.

**The Same as Fixed by General Law.**—The meaning and purpose of this subsection was clouded for some time by the struggle of many courts so to read it into the succeeding subsection as to limit and control the meaning of the latter. But the words speak for themselves. If (a) diverse citizenship or a controversy where the amount in dispute exceeds \$2,000<sup>10</sup> arises, between (b) the trustee

5. See last foot-note but one.

6. *Lathrop v. Drake*, 91 U. S. 516; *Clafin v. Houseman*, 93 U. S. 130; *Olney v. Tanner*, 10 Fed. 101. So also under the law of 1841, *McLean v. Lafayette Bank*, Fed. Cas. 8,885; *Hallack v. Tritch*, Fed. Cas. 5,956; *Brown v. White*, 16 Fed. 900.

7. *Eyster v. Gaff*, 91 U. S. 521;

*Glenny v. Langdon*, 98 U. S. 20; *Moyer v. Dewey*, 103 U. S. 301.

8. See, however, interesting historical matter, pointing to the opposite conclusion, in *In re Murphy*, 3 Am. B. R. 499.

9. See *Collier on Bankruptcy*, 3d ed., p. 239.

10. See Act of March 3, 1887, 25 Stat. at Large, 433.

and an adverse claimant,<sup>11</sup> concerning (c) property acquired or claimed by the trustee,<sup>12</sup> an appropriate suit, (d) either in law or equity, can be laid in the circuit court; but not otherwise.<sup>13</sup> If a suit be transferred from a state court to the circuit court on the ground of diversity of citizenship it is placed there as if it had been originally commenced there on the ground of jurisdiction, and not as if it had been commenced there by consent of the defendant under this section; the judgment of the circuit court of appeals reversing the judgment of the circuit court is, therefore, final.<sup>13a</sup> Thus, in the circuit court, the trustee may be either plaintiff or defendant; while, like the adverse claimant, he has the option of proceeding in the state court, or, if the requisite diversity of citizenship and amount in controversy exists, in the circuit court. Conversely, as appears, *post*, the trustee only can sue in the district court, but only to recover property or annul liens; and suits there need not show diversity of citizenship and \$2,000 in dispute.<sup>14</sup> Thus, the jurisdiction of the circuit court is much more limited than it was under the former law; that of the district court limited, it is true, but not to so marked an extent as is that of the other court.

### III. Subs. b. JURISDICTION OF DISTRICT COURTS.

**Comparative Legislation.**—The district courts have, since the Act of 1800,<sup>15</sup> always had exclusive jurisdiction of “proceedings in bankruptcy.” Under the Act of 1867, their jurisdiction, while not exclusive, also extended “to the marshaling of \* \* \* assets,”<sup>16</sup> and also to “all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by any such person against an

11. See, for cases on meaning of “adverse claimant,” *post*.

12. Compare *Leroux v. Hudson*, 109 U. S. 468; *Schott v. Hudson*, 109 U. S. 477. And see *Bachman v. Packard*, Fed. Cas. 709.

13. *Goodier v. Barnes*, 2 Am. B. R. 328, 94 Fed. 798. And compare *Chattanooga Bank v. Rome Iron Co.*, 3 Am. B. R. 582, 99 Fed. 82. Observe also, for transfer of cases from the district court to the circuit court, thus giving the latter the former’s jurisdiction in certain contingencies, R. S., §§ 601, 637.

13a. *Spencer v. Duplan Silk Co.*, 11 Am. B. R. 563, 191 U. S. 526.

14. Suits laid in the district court by the adverse claimant against the trustee must be under general law and not this section of the bankruptcy law. Consult *In re McCullum*, 7 Am. B. R. 596.

15. Note also Act of February 3, 1801.

16. Act of 1867, § 1, R. S., § 4972. Consult *Cook v. Whipple*, 55 N. Y. 150; *Kelly v. Smith*, Fed. Cas. 7,675.

Subs. b.] Jurisdiction of District Court; *Bardes v. Bank.*

assignee, touching any property or rights of the bankrupt."<sup>17</sup> The same general jurisdiction to "cause the estate of bankrupts to be collected \* \* \* and determine controversies in relation thereto" is conferred on the district court by the present law.<sup>18</sup> But, with this difference: it is qualified by the words, "except as herein otherwise provided." There being no other grant of ordinary jurisdiction to the district court in the statute, the subsection under discussion seems, and has been authoritatively held, a limitation on that power.<sup>19</sup> Hence, the animated controversy over its meaning and the necessity of amendment. The district court is charged with the administration of the law; yet, as the law was before the amendments, it was often impotent and usually forced to order its officers to resort to other tribunals for relief, and this though, from its position as a bankruptcy court, it was naturally more convenient to litigants and more conversant with the law.

"**Bardes v. Bank.**"—Early in the history of the present statute, there was great confusion as to the proper forum for suits either by or against the trustee.<sup>20</sup> Not until January, 1900, was there an authoritative decision in the leading case of *Bardes v. Bank*.<sup>21</sup> It held that the district courts as such had not jurisdiction over a suit brought by the trustee to recover property from a stranger to the bankruptcy proceeding, unless by the latter's consent. The same day, other cases declaring the same doctrine, but on different facts, were also announced.<sup>22</sup> Later, in *Wall v. Cox*, the doctrine was reaffirmed.<sup>23</sup> Subsequently the broad principle was somewhat modified, when applied to other facts. But, prior to the amendments of 1903, the law remained that, provided always the holding of the proposed defendant was adverse, such a suit could be brought only in the state court, or in the circuit court if the usual facts showing federal jurisdiction appeared.

17. Act of 1867, § 2, R. S., § 4979; *Main v. Glen*, Fed. Cas. 8,973; *In re Sabin*, Fed. Cas. 12,195.

18. § 2 (7).

19. *Bardes v. Bank*, ante.

20. See *Collier on Bankruptcy*, 3d ed., p. 239.

21. 178 U. S. 524, 4 Am. B. R. 163; the converse was of course true where the adverse party had consented, for instance, in *In re Durham*,

8 Am. B. R. 115, 114 Fed. 750; *Philips v. Turner*, 8 Am. B. R. 171, 114 Fed. 726.

22. *Mitchell v. McClure*, 178 U. S. 539, affirming s. c., 91 Fed. 621; *Hicks v. Knost*, 178 U. S. 541, affirming 2 Am. B. R. 153, 94 Fed. 625.

23. 181 U. S. 244, 5 Am. B. R. 727; s. c. below, 4 Am. B. R. 659, 101 Fed. 403.

**Amendment of 1903.**—Aside entirely from the unfortunate effect of *Bardes v. Bank* on analogous provisional and summary remedies,<sup>24</sup> amendments restoring concurrent jurisdiction, at least as to suits to recover property, became imperatively necessary and were very generally demanded. This demand was met by the changes made in this subsection and in §§ 60-b, 67-e, and 70-e by the Act of 1903. The Senate Judiciary Committee struck out the words "and section seventy, subdivision e," which in the Ray bill concluded § 23-b, but failed to strike out the corresponding clause conferring jurisdiction, which the latter bill had added to § 70-e. This at once raises a doubt whether any suit to recover property transferred more than four months before the bankruptcy can be laid other than in the state court. This is discussed later.<sup>25</sup> Thus, read together — since a suit to recover property cannot be brought by a trustee save under one of the sections just mentioned — the law now is that suits to recover property either preferentially or fraudulently transferred<sup>26</sup> or incumbered, may be laid either in the proper state court or in a district court, even without the consent of the proposed defendant. If in the district court, it need not be in the district where the bankruptcy proceeding is pending.<sup>27</sup> Such a suit can be brought, under certain circumstances, in the circuit court, as has already been shown.<sup>28</sup> The method adopted by the revisers, of adding the limiting words to the subsection under discussion, makes its phrasing somewhat awkward. There can, however, be no doubt about their intention or the intention of Congress, and little less doubt as to the ultimate construction put on the new words by the courts. For when this amendment became operative, see "Supplemental Section to Amendatory Act," *post*.

*Effect of Amendment.*—This widening of jurisdiction is probably available only to the trustee. The adverse claimant certainly

24. Compare *In re Ward*, 5 Am. B. R. 215, 104 Fed. 985, and *Mueller v. Nugent*, 5 Am. B. R. 176, 105 Fed. 581; s. c., subsequently reversed, 184 U. S. 1, 7 Am. B. R. 224. And see "Effect on Auxiliary Remedies" in this Section, *post*.

25. See Section Seventy.

26. If preferentially transferred, it must have been within four months of the bankruptcy (§ 60-b); if fraudulently, the state statute of limitations

controls (§ 70-e). See *Gregory v. Atkinson*, 11 Am. B. R. 495, 127 Fed. 183, holding that except as to conveyances or preferences made within the four months' period the law remains as it was before the amendment.

27. See *Lathrop v. Drake*, 91 U. S. 516. And compare *Sherman v. Bingham*, Fed. Cas. 12,762, with *Shearman v. Bingham*, Fed. Cas. 12,733.

28. See pp. 263, 264, *ante*.

## Subs. b.]

## Summary Jurisdiction.

cannot sue under § 23-b in the district court,<sup>28a</sup> nor can he by consent confer summary jurisdiction upon the court to determine the merits of a real adverse claim in property alleged to belong to the bankrupt but in the claimant's possession.<sup>28b</sup> There is some doubt as to a receiver's power to sue at all;<sup>29</sup> that he can under § 2 (7) has already been held and is probably the law.<sup>30</sup> But the trustee is rarely defendant; as rarely does he resort to suits other than those specified in the sections already mentioned. "To recover property" undoubtedly includes a suit, the real purpose of which is to annul an incumbrance, other than through legal proceedings.<sup>31</sup> Thus, practically all suits to set aside preferences or fraudulent transfers,<sup>31a</sup> and to avoid liens other than those through legal proceedings, will doubtless hereafter be laid in the district court; with, it is thought, in most instances, a reference by consent to one of the referees in bankruptcy, as special master, to hear and report on the facts as special master. The change thus makes for rapidity and simplicity in administration. Where the litigants are at a distance from the stated sittings of the district court, resort may still be had to the then more accessible state tribunals. In whichever court the suit is laid, it at once becomes subject to the rules and practice there followed.

**Summary Jurisdiction.**—The amendments have not, however, it is thought, changed the effect of present precedents against the exercise of jurisdiction summarily. If the party proceeded against is "an adverse claimant," in the broad sense of the words, he should not, under the present law, be asked to respond to a petition, order to show cause, or motion, any more than he was under the law of 1867, as it was interpreted by *Eyster v. Gaff*.<sup>32</sup> If the

<sup>28a</sup> *Viquesney v. Allen*, 12 Am. B. R. 402 (C. C. A.).

<sup>28b</sup> *In re Teschmacher & Mrazay*, 11 Am. B. R. 547, 127 Fed. 728.

<sup>29</sup> *Boonville Bank v. Blakey*, 6 Am. B. R. 13, 107 Fed. 891. But see *In re Fixen & Co.*, 2 Am. B. R. 822, 96 Fed. 748.

<sup>30</sup> *In re McCallum*, 7 Am. B. R. 596, 113 Fed. 393.

<sup>31</sup> As indicating this, note the use of the word "incumbrance" in § 67-e. And compare *Chapman v. Brewer*, 114 U. S. 158. For an in-

teresting case where jurisdiction was declined, see *Real Estate Trust Co. v. Thompson*, 7 Am. B. R. 520, 112 Fed. 945.

<sup>31a</sup> See *Gregory v. Atkinson*, 11 Am. B. R. 495, 127 Fed. 183.

<sup>32</sup> 91 U. S. 521. Compare *Burbank v. Bigelow*, 92 U. S. 179; *Smith v. Mason*, 81 U. S. 419; *Marshall v. Knox*, 83 U. S. 551; also *In re Rockwood*, 1 Am. B. R. 272, 91 Fed. 363; *In re Kelly*, 1 Am. B. R. 306, 91 Fed. 504; *In re Franks*, 2 Am. B. R. 634, 95 Fed. 635; *In re Baudouine*, 3 Am.

party is in possession of the property adversely claimed by the bankrupt or his trustee he cannot be deprived of the right to litigate the disputed right to possession or ownership in a plenary suit brought either in a district court or the proper state court.<sup>32a</sup> As a matter of right, he should have his day in court in the regular way, *i. e.*, by pleadings, trial, and judgment. On the other hand, if his claim is not strictly adverse, summary process is permissible, even that of contempt.<sup>32b</sup> The court of bankruptcy may ascertain whether in a particular instance the claim asserted is an adverse claim existing at the time the petition was filed; and according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits.<sup>33</sup> If it be ascertained by proper inquiry that a real adverse claim existed — no matter how ill-supported it might appear to be — the court cannot summarily decide as to the validity of the claim.<sup>33a</sup>

*Illustrative Cases.*—Beginning with *White v. Schloerb*,<sup>34</sup> where the property was taken in replevin from the custody of the court after an adjudication, and continuing through *Bryan v. Bernheimer*,<sup>35</sup> which held the vendee of a general assignee within four

B. R. 651, 101 Fed. 547; In re Cohn, 3 Am. B. R. 421, 98 Fed. 75. Cases contra, like In re Francis-Valentine Co., 2 Am. B. R. 522, 94 Fed. 793, are omitted, because, since the amendatory act of 1903, the reasoning of *Bardes v. Bank* and the analogies of the whole statute are against them. But when the claimant also is a bankrupt, summary jurisdiction exists; In re Rosenberg, 8 Am. B. R. 624, 116 Fed. 402. See also cases decided by the Supreme Court under the present law referred to in the next paragraph. The recent case of In re Tune, 8 Am. B. R. 285, 115 Fed. 906, is a valuable addition to the discussion and points out clearly when summary jurisdiction should be assumed and when not.

32a. In re Knickerbocker, 10 Am. B. R. 381, 121 Fed. 1004; In re Rochford, 10 Am. B. R. 608 (C. C. A.), 124 Fed. 182.

32b. In re Davis, 9 Am. B. R. 670, 119 Fed. 950.

33. Louisville Trust Co. v. Com-ingor, 7 Am. B. R. 421, 184 U. S. 18; In re Davis, 9 Am. B. R. 670, 119 Fed. 950; In re Scherber, 12 Am.

B. R. 616. See In re Baird, 8 Am. B. R. 649, 116 Fed. 765.

33a. In re Teschmacher v. Mrazay, 11 Am. B. R. 547, 127 Fed. 728; In re Davis, 9 Am. B. R. 670, 119 Fed. 950; In re Kane, 12 Am. B. R. 444, 131 Fed. 386. But see opinion of Judge Lowell in the case of In re Scherber, 12 Am. B. R. 616, where the case of In re Steuer was distinguished in that the jurisdiction of the referee in proceedings to recover a preference on a summary petition was not objected to; the judge in effect held that in such a case if objection was duly made to the form of the proceeding the court was without jurisdiction, except by plenary suit. It was held that the amendatory act of 1903 gave jurisdiction to the district court over such a controversy, but had done nothing to provide that such jurisdiction should be exercised by summary proceedings on a petition.

34. 178 U. S. 542, 4 Am. B. R. 178.

35. 181 U. S. 188, 5 Am. B. R. 623. Compare *Smith v. Belford*, 5 Am. B. R. 291, 106 Fed. 658.

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Summary Jurisdiction; Amendment of 1903.

months of the bankruptcy, and with knowledge of its existence, amenable to summary process, to *Mueller v. Nugent*,<sup>36</sup> which declared the bankrupt's son, to whom, just prior to bankruptcy, he had delivered a large amount of property which he refused to restore to the trustee, not an adverse claimant, the Supreme Court has already supplied a chain of precedents which limit its broad doctrine in *Bardes v. Bank*. The recent case of *Louisville Trust Co. v. Comingor*,<sup>37</sup> stands by itself, and, while seeming to limit *Bryan v. Bernheimer*, when carefully read, reaffirms it; the holding of the general assignee there being not strictly as assignee, in other words, as agent for the bankrupt, but rather as an individual having acquired title lawfully and without notice, and thus constructively, if not actually, adverse. Each of these decisions turns on whether the defendant is "an adverse claimant." The surety on a bankrupt's bail bond in whose hands money was deposited as an indemnity is an adverse claimant and cannot be proceeded against in the bankruptcy court unless by his consent.<sup>37a</sup> Recent cases construing the meaning of the words "adverse claimant" will also be found in the foot-note.<sup>38</sup>

*Effect of Amendment of 1903.*—The Act of 1903 having made *Bardes v. Bank* no longer the law, it has been suggested that resort may now be had to summary remedies in many cases where it was denied before. But the only change accomplished by the amendments is to give jurisdiction of suits at law and in equity to recover property to the district courts as well as to the courts of the State.

36. 184 U. S. 1, 7 Am. B. R. 224, reversing s. c. below, 5 Am. B. R. 176, 105 Fed. 581; which reversed *In re Nugent*, 4 Am. B. R. 747, 104 Fed. 530. For referee's decision in same case, see 2 N. B. N. Rep. 714.

37. 184 U. S. 18, 7 Am. B. R. 421, affirming *Sinsheimer v. Simonson*, 5 Am. B. R. 537, 107 Fed. 898. As to right of bankruptcy court to require assignee to account for property coming into his hands under an assignment made within four months of the assignor's bankruptcy, see *Matter of Thompson*, 10 Am. B. R. 242, 122 Fed. 174; affirmed, 11 Am. B. R. 719, 128 Fed. 575.

37a. *Jacquith v. Rowley*, 9 Am. B. R. 525, 188 U. S. 620.

38. *In re Waukesha Water Co.*, 8 Am. B. R. 715, 116 Fed. 1009; *In re Macon Sash & Door Co.*, 7 Am. B. R. 66, 112 Fed. 323, reversed as *Carling v. Seymour Lumber Co.*, 8 Am. B. R. 29, 113 Fed. 483; *In re Young*, 7 Am. B. R. 14, 111 Fed. 158; *In re Green*, 6 Am. B. R. 270; *Blumberg v. Bryan*, 6 Am. B. R. 20, 107 Fed. 673; *In re Silberhorn*, 5 Am. B. R. 568, 105 Fed. 899; *In re Scheinbaum*, 5 Am. B. R. 187, 107 Fed. 247; *McFarlan Carriage Co. v. Solanas*, 5 Am. B. R. 442, 106 Fed. 145; *In re Adams*, 12 Am. B. R. 367; *In re Waterloo Organ Co.*, 9 Am. B. R. 427, 118 Fed. 904; *In re Howard*, 10 Am. B. R. 601, 123 Fed. 991; *In re Flynn & Co.*, 11 Am. B. R. 318, 126 Fed. 492.

*Bardes v. Bank* was a lightning flash, like *Eyster v. Gaff* under the other law, and cleared the atmosphere on this puzzling question of summary jurisdiction; but it was not necessary to any of the many recent decisions against summary process, though usually assigned as the reason for the ruling.<sup>39</sup> The jurisdiction to proceed summarily doubtless exists as much now as it did before *Bryan v. Bernheimer* was decided. It is not a question of jurisdiction, but rather of comity and discretion.<sup>40</sup> In facts like those in *White v. Schloerb*, *Bryan v. Bernheimer*, and *Mueller v. Nugent*,<sup>41</sup> it should be exercised. In other facts, amounting to an adverse holding under a legal title before the bankruptcy, it usually will not; as where transfers were made by the bankrupt two years prior to filing the petition in bankruptcy, the court has no jurisdiction of an action to set them aside on the ground of fraud against creditors, without the consent of the proposed defendants.<sup>41a</sup> Having now clearly the right to try controversies by plenary suit, the district court will be more apt to assume and retain jurisdiction which rests only on petition or order to show cause and appearances,<sup>42</sup> and, where possible, consider it as a suit between the parties so in court. But the phrasing of any rule generally applicable is impossible.

**Effect on Auxiliary Remedies.**— So also of the different auxiliary remedies. Where the right to stay should have been exercised before *Bardes v. Bank*, it should be exercised now,<sup>43</sup> the amendments having accomplished no change here.<sup>44</sup> So also of orders to show cause resulting in contempt.<sup>45</sup> The question is not one of jurisdiction, but of comity, of propriety. The court can, but often should not.<sup>46</sup> Likewise, too, of that much mooted question whether a dis-

39. See *In re San Gabriel Sanitarium Co.*, 7 Am. B. R. 206, 111 Fed. 892; also *In re Sheinbaum*, ante; *Mueller v. Nugent* (C. C. A.), ante.

40. See *In re Tune*, 8 Am. B. R. 285, 115 Fed. 906.

41. See foot-notes 34, 35, and 36, ante.

41a. *Gregory v. Atkinson*, 11 Am. B. R. 495, 127 Fed. 183.

42. *In re Steuer*, 5 Am. B. R. 209, 104 Fed. 976.

43. See *In re Currier*, 5 Am. B. R. 639. And compare, for an extreme and, since *Bryan v. Bernheimer*,

doubtful authority, *In re Seebold*, 5 Am. B. R. 358, 105 Fed. 910.

44. As to stays generally, see under Sections Two and Eleven of this work.

45. See under Sections Two and Forty-one.

46. Thus, compare *In re Young*, 7 Am. B. R. 14, 111 Fed. 158, reviewing and affirming *In re Bender*, 5 Am. B. R. 632, 106 Fed. 873; also *In re Green*, ante; *In re Sheinbaum*, ante; *In re Moore*, 5 Am. B. R. 151, 104 Fed. 869; *In re Macon Sash*, etc., Co., ante; *Beach v. Macon Grocery*



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Effect on Auxiliary Remedies.

strict court can summarily bring in a stranger who has a lien on the bankrupt's property and determine its validity, against his protest.<sup>47</sup> If the bankrupt had the title at the time of the bankruptcy, it has the jurisdiction and may assert it. If the court, through its officers, had acquired peaceable possession of the property, under such conditions as to place it and the proceeds thereof *in custodia legis*, it may determine the ownership of such property and proceeds,<sup>47a</sup> and the relative priorities of conflicting claims thereto.<sup>47b</sup> If the bankrupt had not the title, as in the case of chattel mortgages in New York,<sup>48</sup> its jurisdiction is doubtful; and surely not if both title were vested and *res* were in the possession of the mortgagee. Further, if the court has such jurisdiction, the referee has also.<sup>49</sup> Cases will arise where it should be exercised. But, in the long run, unless it is absolutely essential to preserve assets or carry out the purposes of the act, a summary disposition of such controversies in the proceeding and not by suit, should not be asked.<sup>49a</sup> Even a lienor on property vested in and in the possession of the trustee is generally an adverse claimant.<sup>50</sup> The analogies of the statute seem to entitle him, if he desires, to a plenary suit; and the district court will be slow to take it from him. This view is strengthened by the fact that this law, unlike its predecessor,<sup>51</sup> contains no clause authorizing the trustee to sell incumbered property free from existing

Co., 8 Am. B. R. 751, 116 Fed. 143, suggests a way to assert a provisional remedy against an adverse claimant indirectly.

47. For one of the earliest and most vigorous cases in favor of asserting such jurisdiction, see *Carter v. Hobbs*, 1 Am. B. R. 215, 92 Fed. 594; also a chain of cases holding the same way, but on differing facts; for one of the latest and best reasoned, see *In re Kellogg*, 7 Am. B. R. 623, 113 Fed. 120, affirming 6 Am. B. R. 389.

47a. *In re Rodgers*, 11 Am. B. R. 79 (C. C. A.), 125 Fed. 169; *Haven & Geddes Co. v. Pierck*, 9 Am. B. R. 569 (C. C. A.), 120 Fed. 244; *In re Antigo Screen Door Co.*, 10 Am. B. R. 359, 123 Fed. 249; *Crosby v. Spear*, 11 Am. B. R. 613, 98 Me. 542; *In re Leeds Woolen Mills*, 12 Am. B. R. 136, 129 Fed. 922, holding that the

possession once being obtained, the court's authority and control accompanies the property whenever it is, without its consent, taken into the possession of another; *In re Kellogg*, 10 Am. B. R. 7, 121 Fed. 332; *In re Rochford*, 10 Am. B. R. 608, 124 Fed. 182.

47b. *Chauncey v. Dyke Bros.*, 9 Am. B. R. 444 (C. C. A.), 119 Fed. 1.

48. *Bank v. Jones*, 4 N. Y. 497; *Blake v. Corbett*, 120 N. Y. 327.

49. See § 38-a (4) and *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224.

49a. *In re Rochford*, 10 Am. B. R. 608 (C. C. A.), 124 Fed. 182; *In re Moody*, 12 Am. B. R. 718.

50. *In re Rochford*, 10 Am. B. R. 608 (C. C. A.), 124 Fed. 182. Compare *Marshall v. Knox*, 83 U. S. 551. See also *Burbank v. Bigelow*, 92 U. S. 179.

51. R. S., § 5075.

liens. The true test here is the same as that which applies where a stay or order to show cause which may result in contempt is asked; a test sufficiently indicated in the preceding paragraphs. Of course, what goes before does not in any way limit the right of the court to take possession summarily of the property of an alleged bankrupt which is found in his possession or that of his agent.<sup>52</sup> The section does not authorize a federal court to entertain a bill in equity at the instance of a simple contract creditor to set aside an alleged fraudulent conveyance.<sup>52a</sup> Auxiliary proceedings for the protection of the assets of the bankrupt should be brought in the district court of the district in which the proceedings are pending.<sup>52b</sup>

**Jurisdiction of State Courts.**—“Any state court which would have had jurisdiction had not bankruptcy intervened” now has concurrent jurisdiction<sup>53</sup> of any suit which can be brought by the trustee in the district court.<sup>54</sup> Thus, such a court has jurisdiction, not only to set aside a preference, to annul a lien other than through legal proceedings, and to recover back property fraudulently transferred,<sup>55</sup> by the specific words of the act, but it also has, to the same end, such jurisdiction as may be conferred on it by the state law. If, at the time of the bankruptcy, a suit or proceeding is pending in the state court, of which the federal court might otherwise have jurisdiction, the adjudication does not oust the state court of jurisdiction,<sup>56</sup> and the state court can proceed unless stayed. This is peculiarly true of actions *in rem*; the court which first takes the property into its custody retains it.<sup>57</sup> Where the property in con-

52. Compare under Sections Three and Sixty-nine.

52a. *Viquesney v. Allen*, 12 Am. B. R. 401 (C. C. A.).

52b. *In re Williams*, 9 Am. B. R. 741, 120 Fed. 38; *Ross-Mecham Co. v. Southern Car & F. Co.*, 10 Am. B. R. 624, 124 Fed. 403.

53. This has been doubted. See *Lyon v. Clark*, 2 N. B. N. Rep. 792. But consult *French v. Smith*, 4 Am. B. R. 785, and *Bindsell v. Smith*, 5 Am. B. R. 40; *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 12 Am. B. R. 781, 123 Iowa, 432.

54. Under §§ 60-b, 67-e, and, perhaps, 70-e.

55. *Robinson v. White*, 3 Am. B. R. 88.

56. *In re Girdes*, 4 Am. B. R. 346, 102 Fed. 318; *In re English*, 11 Am. B. R. 674 (C. C. A.), 127 Fed. 940.

57. Compare *In re Russell*, 3 Am. B. R. 658, 101 Fed. 248; *In re Chambers*, 3 Am. B. R. 537, 98 Fed. 865; *Southern Loan & Trust Co. v. Benbow*, 3 Am. B. R. 9, 96 Fed. 514; *Keegan v. King*, 3 Am. B. R. 79, 96 Fed. 758; *In re Lemmon*, 7 Am. B. R. 291, 112 Fed. 296; *Crosby v. Spear*, 11 Am. B. R. 613, 98 Me. 542, holding that an action of replevin cannot be commenced and maintained against a trustee to recover property in the possession of the bankrupt at the time of the adjudication.

Subs. b, c.]

Concurrent Jurisdiction of Circuit Court.

troversy is rightfully in possession of a state court or its officers prior to a period of four months before a petition is filed, the adjudication of bankruptcy does not deprive the state court of a right to continue in possession of such property, or of its jurisdiction to determine the controversy.<sup>57a</sup> However, when such taking amounts to a fraud on the law, as through a general assignment or a preference or an attachment, the state court, while not, strictly speaking, ousted, in effect, ceases to exercise jurisdiction, the assignee, or sheriff, or parties being permanently restrained.<sup>58</sup> The adjudication vests in the trustee or temporary receiver the title of the bankrupt's property, and stays all seizures made within four months; it has the force and effect of an attachment and an injunction, and is a caveat to all the world. After such adjudication a state court has no jurisdiction to determine any rights affecting the bankrupt's estate, and is powerless to enforce any of its judgments as to such estate.<sup>58a</sup> The above doctrines are all that can be safely stated. The whole subject is hopelessly befogged by the fact that each class of courts unconsciously strains for jurisdiction in close cases. Some of the more reliable decisions will be found in the foot-note.<sup>59</sup>

#### IV. Subs. c. CONCURRENT JURISDICTION OF CIRCUIT COURT OVER OFFENSES.

**Meaning and Scope.**— This subsection has nothing to do with civil actions.<sup>60</sup> It follows the policy of the federal statutes in giving circuit and district courts much the same jurisdiction.<sup>61</sup> Elsewhere in the law, the district courts are given jurisdiction to arraign, try, and punish those who commit any of the offenses enumerated in the act.<sup>62</sup> Were it not for this subsection, jurisdiction so to do would be exclusive in the district court. It is now concurrent. The trial of offenses will, however, almost invariably be moved at a stated term of the district court.

<sup>57a</sup> In re English, 11 Am. B. R. 674 (C. C. A.), 127 Fed. 940.

<sup>58</sup> See pp. 26, 27, ante. See Matter of Hornstein, 10 Am. B. R. 308, 122 Fed. 266.

<sup>58a</sup> In re Muskoka Lumber Co., 11 Am. B. R. 758, 127 Fed. 760; In re Knight, 11 Am. B. R. 1, 125 Fed. 35.

<sup>59</sup> In re Russell, supra; In re Woodbury, 3 Am. B. R. 457, 98 Fed. 833; Robinson v. White, supra; In re

Sievers, 1 Am. B. R. 117, 91 Fed. 366; In re Emslie, 4 Am. B. R. 126, 102 Fed. 290; In re Pittlekow, 1 Am. B. R. 472, 92 Fed. 91; Heath v. Shaffer, 2 Am. B. R. 98, 93 Fed. 647; Small v. Muller, 8 Am. B. R. 448; In re Spitzer, 12 Am. B. R. 346 (C. C. A.).

<sup>60</sup> Goodier v. Barnes, 2 Am. B. R. 328, 94 Fed. 798.

<sup>61</sup> See R. S., § 629.

<sup>62</sup> § 2 (4).

## SECTION TWENTY-FOUR.

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### JURISDICTION OF APPELLATE COURTS.

§ 24. **Jurisdiction of Appellate Courts.**— *a* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

*b* The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

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**Analogous provisions:** In U. S.: *As to appellate jurisdiction*, Act of 1867, §§ 9, 24, R. S., §§ 4980, 4981, 4982, 4983, 4984, 4985, 4989; Act of 1841, § 4; *As to supervisory jurisdiction*, Act of 1867, § 2, R. S., §§ 4986, 4987, 4988; Act of 1841, § 6.

In Eng.: Act of 1883, § 104; General Rules 129-134A.

**Cross references:** To the law: §§ 1 (3) (8) (24); 25.

To the General Orders: XXXVI.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Comparative Legislation.

Appeals under Law of 1867.

Scope and Meaning of Section.

## § 24.] Synopsis of Section; Comparative Legislation.

**II. Subs. a. Appellate Jurisdiction.***In General.***From the District or Circuit Court Direct to the Supreme Court.****From the District Court to the Circuit Court of Appeals.****Other Methods of Review.****Writs of Error from the Supreme Court to the Highest Court of the State.***Illustrative Cases.**Practice.***III. Subs. b. Supervisory Jurisdiction.***In General.***I. COMPARATIVE LEGISLATION.**

**Appeals under Law of 1867.**—The former law was as simple in respect to appeals as the present, at first glance, seems complicated. Appeals as in equity cases and writs of error in those at law were heard in the circuit courts wherever the amount in controversy exceeded \$500; the circuit court had supervisory jurisdiction of all cases and questions arising in a court of bankruptcy within its jurisdiction; appeals and writs of error could be heard in the Supreme Court only when the matter in dispute exceeded \$5,000.<sup>1</sup> There was also the usual review by writ of error in the latter court of certain judgments of the highest courts of the States. Since that law was repealed, the circuit courts of appeals have been vested with the appellate jurisdiction of the circuit court; while, that their calendars might not be congested with a multitude of petty questions, the appellate courts no longer “sit at the elbow”<sup>2</sup> of the court of bankruptcy, but appeals involving questions of fact are limited to important and vital matters, and superintendence may be asked only of questions of law.<sup>3</sup> Thus, the entire system has been radically changed, and the cases under the former law are of little value. Further differences between the old and the new system are discussed in detail later under this Section and under Section Twenty-five, *post*.

**Scope and Meaning of Section.**—As explained later, this § 24 is here treated as if its subsection b were a part of § 25. It is clear

1. See “Analogous Provisions,” ante.

2. In re Adler, 4 Am. B. R. 583, 590, 103 Fed. 444.

3. See § 25 and read § 24-b.

from the caption that the section has to do only with the jurisdiction of appellate courts. Like § 2, it confers jurisdiction; § 25 and subsection b of § 24 seem, rather, to limit it. Thus, subsection a is general in its terms, and makes applicable the general law so far as it confers appellate jurisdiction of controversies in the district court, by giving the courts named a general appellate jurisdiction over questions arising in that court while sitting in bankruptcy.<sup>4</sup> This subsection has no reference to appeals to the Supreme Court from the Circuit Courts of Appeals. Except as expressly specified therein the jurisdiction of the Supreme Court is not broadened in any way.<sup>4a</sup> It has been thought that the words "controversies in bankruptcy proceedings" in this section, and the words "in bankruptcy proceedings" in the next section refer to different classes of cases; the suggestion being that the former means only controversies outside of the bankruptcy proceeding proper, as suits between the trustee and adverse claimants.<sup>5</sup> But the more reasonable view is that the two phrases mean the same thing; the appeal must be from a court of bankruptcy, whose sole jurisdiction as such was, prior to the amendments of 1903, over bankruptcy proceedings *per se*;<sup>6</sup> and that the terms of § 25 are, as to the judgments and the cases there enumerated, by way of limitation on the general jurisdiction here recognized. Manifestly the jurisdiction conferred by this subsection is, so far as applicable, that conferred on circuit courts of appeals by the Evarts Act.<sup>7</sup> This act and the limitations suggested by what follows under this Section and Section Twenty-five, should be consulted for an understanding of the broad scope, yet accurate boundaries, of appeals in bankruptcy.

## II. Subs. a. APPELLATE JURISDICTION.

**In General.**— Under this subsection, the only matters which can be reviewed are "controversies arising in bankruptcy proceed-

4. Thus, see *In re Columbia Real Estate Co.*, 7 Am. B. R. 441, 112 Fed. 643; also *Stelling v. Jones Lumber Co.*, 8 Am. B. R. 521, 116 Fed. 261; *Scott & Co. v. Wilson*, 8 Am. B. R. 349, 115 Fed. 284.

4a. *Hutchinson v. Otis, Wilcox & Co.*, 10 Am. B. R. 275 (C. C. A.), 123 Fed. 14.

5. *In re Adler*, 4 Am. B. R. 583, 103 Fed. 444; *Burleigh v. Foreman*, 11 Am. B. R. 74 (C. C. A.), 125 Fed. 217.

6. See *Bardes v. Bank*, 178 U. S.

524, 4 Am. B. R. 163; *Ingram v. Wilson*, 11 Am. B. R. 192 (C. C. A.), 125 Fed. 913. Compare as to time within which appeal must be taken, *Boonville Nat. Bank v. Blakey*, 6 Am. B. R. 13, 107 Fed. 891.

7. Act of March 3, 1891, § 6. Compare also *Duncan v. Landis*, 5 Am. B. R. 649, 106 Fed. 839; *Steele v. Buel*, 5 Am. B. R. 165, 104 Fed. 968; *In re Columbia Real Estate Co.*, supra; *Stelling v. Jones Lumber Co.*, supra.

Subs. a.]

Other Methods of Review; Writs of Error.

ings;" the only court which may be appealed from is the court of bankruptcy, which phrase, as here used, does not include the referee;<sup>8</sup> and the only courts which can hear such an appeal are the several courts mentioned. So also, appeals can be taken only to the proper court in whose territorial jurisdiction the court of bankruptcy appealed from is.<sup>9</sup> The appellate courts are given jurisdiction to sit "in vacation in chambers and during their respective terms;" which seems to mean that such courts are always in session for the sake of appeals.

**From the District or Circuit Court Direct to the Supreme Court.**—When and how this may be done is discussed under Section Twenty-five.<sup>10</sup>

**From the District Court to the Circuit Court of Appeals.**—This also is discussed in the same place.<sup>11</sup>

**Other Methods of Review.**—That by petition and revision<sup>12</sup> and by *certiorari*,<sup>13</sup> neither of which, however, flows wholly from the general grant of power in this section, are also considered under Section Twenty-five.

**Writs of Error from the Supreme Court to the Highest Court of a State.**—Here the general law, not the bankruptcy law, applies; the latter is silent and does not in any way affect the right to such an appeal given by the Revised Statutes.<sup>14</sup> This method of review

8. Appeals from the referee are provided for elsewhere. See § 2 (10); General Order XXVII.

9. In re Seebold, 5 Am. B. R. 358, 105 Fed. 910. Compare In re Blair, 5 Am. B. R. 793, 106 Fed. 662.

10. See Section Twenty-five.

11. Id.

12. § 24-b.

13. § 25-d.

14. R. S., § 709. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where

any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ.

will be found valuable in proceedings involving bankruptcy questions in the courts of the States, as, for instance, where a state court has erroneously interpreted a provision in the bankruptcy law,<sup>15</sup> or refused to recognize the validity of a discharge duly granted.<sup>16</sup> The limitations of the Revised Statutes should, however, always be borne in mind. A previous edition of this work summarizes the cases where such a writ of error may be asked, as follows:

First, where there has been a decision against the validity of any portion of the bankruptcy act; second, where a decision has been had by the state court sustaining a statute of the State claimed to be repugnant to the bankruptcy act; or, third, where the right, title, privilege or immunity of any person claimed under the bankruptcy statute has been denied by a state court.<sup>17</sup>

*Illustrative Cases.*— There are also other limitations. The federal question must have been raised in the state court;<sup>18</sup> even if passed on there, if the decision may be affirmed for other reasons, it will not be disturbed.<sup>19</sup> The amount in dispute makes no difference; but only questions at law will be reviewed.<sup>20</sup> Such a writ of error can be directed only to the highest court of the State in which a decision of the matter in controversy could be had.<sup>21</sup> See also other cases in the foot-note.<sup>22</sup>

*Practice.*— Appeals of this character being outside of the bankruptcy law, the practice is identical with that on writs of error from the Supreme Court to such a state court in cases involving federal questions other than those growing out of the bankruptcy law.<sup>23</sup>

15. *Hill v. Harding*, 107 U. S. 631; *Williams v. Heard*, 140 U. S. 529.

16. *Hennequin v. Clews*, 111 U. S. 677; *Strang v. Bradner*, 114 U. S. 555; *Forsyth v. Vehmeyer*, 177 U. S. 177, 3 Am. B. R. 807.

17. *Collier on Bankruptcy*, 3d ed., p. 243.

18. *Columbia Water Power Co. v. Street Railway Co.*, 172 U. S. 475; *Pim v. St. Louis*, 165 U. S. 273.

19. *Bausman v. Dixon*, 173 U. S. 113. Compare also *Castillo v. McConnico*, 168 U. S. 674, and *Briggs v. Walker*, 171 U. S. 466.

20. *Egan v. Hart*, 165 U. S. 188.

21. R. S., § 709.

22. *Linton v. Stanton*, 12 How. 423; *Scott v. Kelly*, 22 Wall. 57; *Dimock v. Revere Copper Co.*, 117 U. S. 559; *McKenna v. Simpson*, 129 U. S. 506; *Backus v. Fort Street Co.*, 169 U. S. 557; *Bellingham Bay v. New Whatcom*, 172 U. S. 314; *McQuade v. Trenton*, 172 U. S. 636.

23. See *Foster's Federal Practice*, § 477 et seq. See also *Desty's Federal Procedure*, 9th ed., § 536, and Form No. 680.



## III. Subs. b. SUPERVISORY JURISDICTION.

**In General.**— This method of reviewing the proceedings in courts of bankruptcy belongs properly under § 25. The words here doubtless have a double purpose; they confer jurisdiction, and in so far are properly in this section, but they also indicate the classes of questions which may be revised by petition and somewhat of the practice on revision. This very important method of review is discussed elsewhere.<sup>24</sup>

24. See under Section Twenty-five of this work.

## SECTION TWENTY-FIVE.

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### APPEALS AND WRITS OF ERROR.

§ 25. **Appeals and Writs of Error.**— *a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

*b* From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

*c* Trustees shall not be required to give bond when they take appeals or sue out writs of error.

*d* Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

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Subs. a.]      Synopsis of Section; Scope and Meaning.

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**Analogous provisions:** In U. S.: *As to appeals to the circuit courts*, Act of 1867, §§ 8, 24, R. S., §§ 4980, 4981, 4982, 4983, 4984, 4985; Act of 1841, § 4; *As to appeals to the Supreme Court*, Act of 1867, § 9, R. S., § 4989; *As to petitions for revision*, Act of 1867, § 2, R. S., §§ 4986, 4987; Act of 1841, § 6.

**In Eng.:** Act of 1883, § 104; General Rules 129-134A.

**Cross references:** **To the law:** §§ 1 (3) (8) (24); 24.

**To the General Orders:** XXXVI.

**To the Forms:** None.

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## SYNOPSIS OF SECTION.

### I. Subs. a. Appeals to a Circuit Court of Appeals.

Scope and Meaning of Section.

*Appeals May be Had in Bankruptcy.*

**Petitions to Revise in Matter of Law.**

*Practice and Illustrative Cases.*

*What May be Reviewed by Petition.*

*Petitions and Appeals Combined.*

**Appeals as in Equity Cases.**

*When and by Whom Taken.*

*From what Judgments.*

*Appeals in Compositions.*

*Practice.*

### II. Subs. b. Appeals to the Supreme Court.

From a Circuit Court of Appeals.

Practice.

### III. Subs. c. No Appeal Bond Required of Trustee Who Appeals.

In General.

### IV. Subs. d. Certificate and Certiorari.

Certificates to the Supreme Court.

Writs of Certiorari from the Supreme Court.

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## I, Subs. a. APPEALS TO A CIRCUIT COURT OF APPEALS.

**Scope and Meaning of Section.**—This section both limits and explains the general jurisdiction conferred by § 24-a. For reasons already indicated, the summary method of revising in matter of law is discussed here, though the jurisdiction is really conferred by § 24-b. To the practitioner in the state courts, especially in

the code States, the federal system of appeals seems a labyrinth. That he may have, as it were, a few landmarks to guide him, the following analysis of methods of appeal in bankruptcy, other than reviews of referees' decisions by the judge, may be found useful. It does not include reviews by the Supreme Court of bankruptcy decisions in the highest courts of the States.<sup>1</sup> The foot-note references are intended only to call attention to cases in which the specified method has been employed under the present law.

*Appeals May be Had in Bankruptcy:*

1. IN THE SUPREME COURT OF THE UNITED STATES:

- (a), *By appeal or writ of error*, from a circuit court of appeals, or a district court not within any organized circuit, or the supreme court of the District of Columbia, by a party aggrieved by either of the judgments mentioned in § 25-a, but not otherwise.<sup>2</sup>
- (b), *By writ of certiorari*, to a circuit court of appeals, if permitted by general law.<sup>3</sup>
- (c), *By certificate*, from either a circuit court of appeals or a district court direct, if permitted by general law.<sup>4</sup>

2. IN A CIRCUIT COURT OF APPEALS:

- (a) *By appeal or writ of error*, from a district court in its circuit sitting in bankruptcy; if within the limitations of § 25-a, but not otherwise.<sup>5</sup>
- (b) *By petition to revise* in matters of law any order of a district court in its circuit sitting in bankruptcy.<sup>6</sup>

3. IN THE SUPREME COURT OF A TERRITORY:

- (a) *By appeal or writ of error*, from a district court of the territory sitting in bankruptcy; if within the limitations of § 25-a, but not otherwise.<sup>7</sup>

1. See pp. 259-260, ante.

2. *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 5 Am. B. R. 824; *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178; *Audubon v. Schuffeldt*, 181 U. S. 575, 5 Am. B. R. 829.

3. *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623; *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *Louisville Trust Co. v. Comin-  
gor*, 184 U. S. 18, 7 Am. B. R. 421.

4. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163; *Hicks v. Knost*, 178 U. S. 541, 4 Am. B. R. 178; *Wall v. Cox*, 181 U. S. 244, 5 Am. B. R. 727; *Wilson v. Nelson*, 183 U. S. 191, 7 Am. B. R. 142.

5. Numerous cases are cited, post.

6. *Id.*

7. Compare *In re Blair*, 5 Am. B. R. 793, 106 Fed. 662; *In re Stumpff*, 4 Am. B. R. 267.

Subs. a.]

Petitions to Revise in Matter of Law.

**Petitions to Revise in Matter of Law.**—This is clearly the same revisory power conferred on the circuit courts by previous bankruptcy laws. It was somewhat imperfect under the law of 1841, depending on the order or certificate of the lower court for its exercise.<sup>8</sup> Under the statute of 1867, it was often availed of and, because summary in its nature and simple in its application, was the usual method of reviewing questions of law. Under the present act, it divides with appeals as in equity causes the great majority of reviews heard by the circuit court of appeals. It differs from such appeals in two important particulars: Petitions to revise bring up questions of law only; appeals, both the law and the facts.<sup>8a</sup> The former call up any order or judgment or judicial action in the bankruptcy proceeding; the latter three classes of final judgments only. But revision is not available on the review of judgments in suits to recover assets.<sup>9</sup> These distinctions are now well settled by the courts.<sup>10</sup>

*Practice and Illustrative Cases.*—Here the general orders and forms are both silent.<sup>11</sup> The petition should be by a party aggrieved,<sup>12</sup> and usually entitled in, addressed to and filed with the clerk of, the proper circuit court of appeals. If more convenient, it may also be addressed to and filed with the clerk of the court appealed from. It should recite the proceedings below, state specifically the question of law involved and the ruling of the district court thereon, and be accompanied by a certified copy

8. *Ex parte Christy*, 3 How. 292.

8b. *Elliott v. Toeppner*, 9 Am. B. R. 50, 187 U. S. 327.

9. *In re Rusch*, 8 Am. B. R. 518, 116 Fed. 270. See also *In re Jacobs*, post.

10. *In re Rouse, Hazard & Co.*, 1 Am. B. R. 234, 91 Fed. 96; *In re Purvine*, 2 Am. B. R. 787, 96 Fed. 192; *In re Richards*, 3 Am. B. R. 145, 96 Fed. 935; *In re Jacobs*, 3 Am. B. R. 671, 99 Fed. 539; *Courier-Journal, etc. v. Brewing Co.*, 4 Am. B. R. 183, 101 Fed. 699; *In re Ives*, 7 Am. B. R. 692, 113 Fed. 911; *Hutchinson v. Le Roy*, 8 Am. B. R. 20, 113 Fed. 200; *In re Abraham*, 2 Am. B. R. 266, 93 Fed. 767 (in Supreme Court, *Bryan v. Bernheimer*).

11. See, however, rules in the First Circuit, 94 Fed., p. iii, iv; and in the Fourth Circuit, 97 Fed., p. iii, iv. See also forms within these rules in "Supplementary Forms," post. If the petition is filed in the first instance in the district court, it is heard by the judge ex parte, and is followed by an order allowing or declining allowance. If allowed, the clerk prepares, at the expense of the petitioner, a transcript of the record and certifies the same to the proper circuit court of appeals. Thereafter the practice in that court is the same as that outlined in the text and the rules in the First and Fourth Circuits above referred to.

12. *In re Jemison Mercantile Co.*, 7 Am. B. R. 588, 112 Fed. 966.

of so much of the record as will show the issue of law and how it arose;<sup>13</sup> if it does not, the court may dismiss, with leave to supplement, or may suspend consideration until the record is completed.<sup>13a</sup> The petition should be filed within a reasonable time after the order or ruling complained of, but the ten-day limitation made by § 25-a on the taking of an appeal does not apply.<sup>14</sup> If not regulated by the rules of the appellate court, the analogies of the statute and general orders suggest that the petition be signed and verified by the party aggrieved, and not by his attorney. On filing, "due notice" to the opposite party is required,<sup>15</sup> and the case is proceeded with in accordance with the rules and practice of the court;<sup>16</sup> the respondent answering, and argument being had with or without briefs. The decision of the circuit court of appeals on such a review is not in turn appealable,<sup>17</sup> but can be transferred to the Supreme Court on *certiorari*.<sup>18</sup> Such a petition for revision does not remove the case or that portion of it on review to the highest court, and if, while there pending, the respondent below dismisses it, he should pay the costs of the review.<sup>19</sup> Nor should it be dismissed for lack of parties, where the missing parties were represented below by the trustee who is a party in the appellate court.<sup>20</sup> Whether a petition can be filed asking revision of the order of the district court of a Territory is yet a question.<sup>21</sup> If the district court is not within the territorial jurisdiction of any circuit court of appeals, it seems that it cannot, though superintendence may perhaps be had in another way.<sup>22</sup>

13. In re Richards, *supra*; In re Baker, 4 Am. B. R. 778, 104 Fed. 287; In re Reed, Fed. Cas. 11,638; In re Casey, Fed. Cas. 2,495. The certified copy can usually be filed within thirty days.

13a. Devries v. Shanahan, 10 Am. B. R. 518, 122 Fed. 629.

14. In re N. Y. Econ. Pr. Co., 5 Am. B. R. 697, 106 Fed. 839. But see In re Worcester Co., 4 Am. B. R. 496, 102 Fed. 808; In re Good, 3 Am. B. R. 605, 94 Fed. 389; Littlefield v. D., H. & C. Co., Fed. Cas. 8,400. This, or a similar, limitation is, however, usually made by the rules of the circuit court of appeals. As to reasonable excuse for delay, see In re Groetzinger, 11 Am. B. R. 467 (C. A.), 127 Fed. 124.

15. § 24-b. This is usually by a notice or order to show cause issued by the clerk and served by mail or otherwise, with a copy of the petition.

16. In re Baker, *supra*.

17. Hall v. Allen, 12 Wall. 452; Conro v. Crane, 94 U. S. 441; nor is it reviewable on a motion to amend the order appealed from. In re Henschel, 8 Am. B. R. 201.

18. See in this Section, *post*.

19. In re Orman, 5 Am. B. R. 698, 107 Fed. 101.

20. In re Utt, 5 Am. B. R. 383, 105 Fed. 754.

21. In re Stumpff, 4 Am. B. R. 267.

22. In re Blair, 5 Am. B. R. 793, 106 Fed. 662.

Subs. a.]

What May be Reviewed by Petition.

*What May be Reviewed by Petition.*—Any final or interlocutory order in matter of law may be reviewed by petition.<sup>23</sup> It has been held that the power of the appellate court to review by original petition the rulings of the bankruptcy court extends only to an order made in the bankruptcy proceedings proper and does not embrace proceedings in suits by the trustee in bankruptcy.<sup>23a</sup> This method is that usually adopted when a party claims to be aggrieved because of an injunction<sup>24</sup> or summary order,<sup>25</sup> or where an appeal will not lie under the terms of § 25-a. The precedents are already numerous and cover so wide a field as to make the formulation of any safe rule impossible. Orders determining the rights of claimants to a fund in the possession of a bankruptcy court and being administered by it in the course of bankruptcy proceedings are reviewable by petition.<sup>25a</sup> But such reviews will not usually be allowed where the granting of the order was discretionary,<sup>26</sup> or the rights of the petitioning party were not affected by the order complained of,<sup>27</sup> or where it presents questions of fact only.<sup>28</sup> Further, it is thought that, § 25-a having provided a means to review three kinds of judgments, every other means is excluded, and, therefore, that such judgments cannot be reviewed by petition.<sup>29</sup> And except where an appeal may be had as provided in such section the appropriate procedure in the circuit court of appeals seems to be by a petition for review.<sup>29a</sup>

23. *Scott & Co. v. Wilson*, 8 Am. B. R. 349, 115 Fed. 284; *Courier-Journal Printing Co. v. Schaefer-Meyer Brewing Co.*, 4 Am. B. R. 183, 101 Fed. 699.

23a. *In re Antigo Screen Door Co.*, 10 Am. B. R. 359 (C. C. A.), 123 Fed. 249.

24. *Davis v. Bohle*, 1 Am. B. R. 412, 92 Fed. 325; *In re Kenney*, 3 Am. B. R. 353, 97 Fed. 554.

25. *In re Abraham*, ante; *In re Purvine*, 2 Am. B. R. 787; *In re Francis-Valentine Co.*, 2 Am. B. R. 522, 94 Fed. 793, 98 Fed. 414; *Fisher v. Cushman*, 4 Am. B. R. 646, 103 Fed. 860; *In re Seebold*, 5 Am. B. R. 358, 105 Fed. 910.

25a. *In re Antigo Screen Door Co.*, 10 Am. B. R. 359 (C. C. A.), 123 Fed. 249, and cases cited.

26. *In re Lesser*, 3 Am. B. R. 758,

99 Fed. 91; *Ex parte Perkins*, Fed. Cas. 10,982. This is not so when the exercise of the discretion involves a substantial legal right. *In re Carley*, 8 Am. B. R. 720, 117 Fed. 130.

27. *In re Madden*, 6 Am. B. R. 614, 110 Fed. 348; *Fisher v. Cushman*, supra; *In re Rosser*, 4 Am. B. R. 153, 101 Fed. 562.

28. *In re Eggert*, 4 Am. B. R. 449, 102 Fed. 735.

29. *In re Good*, 3 Am. B. R. 605, 99 Fed. 389; *In re Worcester Co.*, ante; *Smith v. Mason*, 14 Wall. 419.

29a. *In re Groetzinger*, 11 Am. B. R. 467 (C. C. A.), 127 Fed. 124, in which case it was held that an order for the distribution of the proceeds of the sale by a trustee of real estate is reviewable only by petition for review.

*Petitions and Appeals Combined.*—There is often difficulty in determining whether the remedy is by appeal or petition; sometimes the two are combined. In such a case, the two do not neutralize each other, but the court will proceed to adjudicate on the controversy under the appropriate proceeding.<sup>30</sup> So also an appeal may in proper cases be treated as a petition to revise,<sup>31</sup> as where an appeal is taken from an order disallowing a claim which presents only a question of law.<sup>31a</sup>

*Appeals as in Equity Cases.*—The general jurisdiction over appeals in controversies arising in bankruptcy proceedings is discussed under Section Twenty-four.<sup>32</sup> This subsection supplements and explains such general jurisdiction. As to the three classes of judgments mentioned, it is exclusive.<sup>33</sup> But where the judgment is for dismissal of a creditor's petition on the verdict of a jury, errors in rulings on evidence and instruction to the jury can be reviewed only by writ of error.<sup>34</sup>

*When and by Whom Taken.*—Such an appeal can be taken only from a district court sitting in bankruptcy to the circuit court of appeals of its circuit. Appeals to the Supreme Court of a Territory are discussed elsewhere. It must be taken within ten days.<sup>35</sup> But, if the time has expired, the district court may in a meritorious case grant a reargument, that the ten days may run from the second order.<sup>36</sup> The time begins from the actual entry of the judgment by delivering the same to the clerk.<sup>37</sup> This limitation does not, however, affect appeals in independent suits to recover assets.<sup>38</sup> An appeal must be taken by a party aggrieved.<sup>39</sup> Where the creditors

30. *Fisher v. Cushman*, supra; *In re Worcester Co.*, ante. See also *Lockman v. Lang*, 12 Am. B. R. 497, 132 Fed. 1.

31. Compare *In re Whitener*, 5 Am. B. R. 198, 108 Fed. 180.

31a. *Chesapeake Shoe Co. v. Seldner*, 10 Am. B. R. 466 (C. C. A.), 122 Fed. 593.

32. See pp. 276, 277, ante, and *Duncan v. Landis*, 5 Am. B. R. 649, 106 Fed. 839.

33. *In re Good*, supra.

34. *Elliott v. Toepfner*, 187 U. S. 327, 9 Am. B. R. 50.

35. Compare, for time under the

former law, *Sedgwick v. Fridenberg*, Fed. Cas. 12,611; *Wood v. Bailey*, 21 Wall. 640.

36. *In re Wright*, 3 Am. B. R. 184, 96 Fed. 820; s. c. on appeal, *In re Worcester Co.*, ante; *Stickney v. Wilt*, 23 Wall. 150.

37. *Peterson v. Nash Bros.*, 7 Am. B. R. 181, 112 Fed. 311.

38. *Boonville, etc. v. Blakey*, 6 Am. B. R. 13, 107 Fed. 891; *Steele v. Buel*, 5 Am. B. R. 165. Consult also *Stelling v. Jones Lumber Co.*, 8 Am. B. R. 521, 116 Fed. 261.

39. *In re Roche*, 4 Am. B. R. 369, 101 Fed. 956.



Subs. a.]

From what Judgments.

as a body are aggrieved, the trustee only should appeal.<sup>40</sup> But this right is not, strictly speaking, limited to him. It seems that a creditor may appeal,<sup>41</sup> and, if the trustee refuses to do so, the district court has the power, on a proper application, either to order him to take the appeal, or to direct that a creditor be permitted to do so.<sup>42</sup>

*From what Judgments.*—Clearly an appeal may be taken under this subsection only from (a) a judgment granting or refusing an adjudication,<sup>43</sup> (b) granting or denying a discharge, or (c) allowing or rejecting a claim of five hundred dollars or over.<sup>44</sup> The word "claim" has been held limited to a money demand.<sup>45</sup> It seems also that on an appeal the court may consider the priority of the claim under review,<sup>46</sup> though, this being a question of law, it is better brought up on petition.<sup>47</sup> An appeal will also lie from a judgment fixing the amount due on a secured claim.<sup>48</sup> An order dismissing an application for a discharge for want of prosecution, is in substance and effect a judgment denying the discharge, and can only be reviewed on appeal.<sup>48a</sup> An appeal may be taken under this subsection from an order allowing or disallowing a claim as from a judgment.<sup>48b</sup> Where a district court has jurisdiction to determine whether a corporation is engaged in such business as to authorize an adjudication of bankruptcy, the order of adjudication is appealable to the circuit court of appeals.<sup>48c</sup> Cases where appeals have been dismissed will be found in the foot-notes.<sup>49</sup>

40. *Foreman v. Burleigh*, 6 Am. B. R. 230, 109 Fed. 313.

41. *In re Roche*, supra. Compare *Chatfield v. O'Dwyer*, 4 Am. B. R. 313, 101 Fed. 797.

42. *McDaniel v. Stroud*, 5 Am. B. R. 695, 106 Fed. 486.

43. See *Elliott v. Toeppner*, ante; also *In re Good*, ante.

44. *In re Dickson*, 7 Am. B. R. 186, 111 Fed. 726; *In re Groetzinger*, 11 Am. B. R. 467, 127 Fed. 124.

45. *In re Whitener*, ante.

46. *Cunningham v. Bank*, 4 Am. B. R. 192, 103 Fed. 932.

47. Compare *In re Worcester Co.*, ante.

48. *In re Roche*, ante.

48a. *In re Kuffler*, 11 Am. B. R. 469 (C. C. A.), 127 Fed. 125.

48b. *Chesapeake Shoe Co. v. Seldner*, 10 Am. B. R. 466 (C. C. A.),

122 Fed. 593; *Rush v. Lake*, 10 Am. B. R. 455, 122 Fed. 561, reversing 7 Am. B. R. 96; *Dickson v. Nyman*, 7 Am. B. R. 186. In the case of *Hutchinson v. Otis*, 10 Am. B. R. 135, 190 U. S. 552, it was held that a decree rendered upon a petition asserting a lien on the proceeds of a seat in a stock exchange which formerly belonged to the bankrupts was not "a judgment allowing or rejecting a debt or claim of \$500 or over," within subdivision 3 of subsection 25-a.

48c. *Columbia Iron Works v. National Lead Co.*, 11 Am. B. R. 340, 127 Fed. 99; *First Nat. Bank of Denver v. Klug*, 8 Am. B. R. 12, 186 U. S. 202.

49. *Fisher v. Cushman*, ante; *Goodman v. Brenner*, 6 Am. B. R. 470, 109 Fed. 481; *Hutchinson v. Le Roy*, 8 Am. B. R. 20, 113 Fed. 200;

*Appeals in Compositions.*—This is discussed elsewhere.<sup>50</sup> The leading cases are also set out in the foot-note.<sup>51</sup>

*Practice.*—This conforms to that in other appeals in equity to a circuit court of appeals. General Order XXXVI should be consulted; also the rules of each circuit.<sup>52</sup> The petition, accompanied by an assignment of errors,<sup>52a</sup> must first be presented to and allowed "by a judge of the court appealed from or the court appealed to." If the appellant is not the trustee,<sup>53</sup> an appeal bond must, either then or on the perfection of the appeal in the appellate court, be approved by the judge and filed.<sup>54</sup> Where an appeal is allowed within the prescribed time, it will not be dismissed because of a delay of a few days in filing the bond.<sup>54a</sup> When the appeal is allowed, a citation is issued to and served on the opposite party.<sup>55</sup> Not until this is done is the appeal perfected; and, it seems, all this must be done within the ten days.<sup>56</sup> The record<sup>57</sup> of the case is then certified up and printed; and the case is brought on and argued in the usual way. But the record need not include findings of fact by the court below.<sup>58</sup> Nor need the appellate court consider errors not specifically assigned,<sup>59</sup> though this is, of course, discretionary. Costs follow the practice and rules of the court, but where, in an appeal against a trustee, the order below is reversed on a proposition brought forward by the appellate court itself, no costs will be allowed.<sup>60</sup> Whether an appeal acts as a stay on proceedings in the court below is a question not often important. It may be obviated

In re Alden Elect. Co., 10 Am. B. R. 370 (C. C. A.), 123 Fed. 415.

50. See under Section Twelve, p. 159, ante.

51. In re Adler, 4 Am. B. R. 583, 103 Fed. 444; U. S. ex rel. Adler v. Hammond, 4 Am. B. R. 736, 104 Fed. 862; Adler v. Jones, 6 Am. B. R. 245, 109 Fed. 967; Ross v. Saunders, 5 Am. B. R. 350, 105 Fed. 915.

52. No forms are suggested in "Supplementary Forms," post, for the reason that the customary forms on appeals and writs of error under the federal practice are available and should be used.

52a. Lockman v. Lang, 11 Am. B. R. 597 (C. C. A.), 128 Fed. 279; s. c., 12 Am. B. R. 497 (C. C. A.), 132 Fed. 1.

53. § 25-c.

54. R. S., §§ 1000, 1001; Peugh v. Davis, 110 U. S. 227; Dodge v. Knowles, 114 U. S. 430. See Williams Bros. v. Savage, 9 Am. B. R. 720 (C. C. A.), 120 Fed. 497.

54a. Columbia Iron Works v. National Lead Co., 11 Am. B. R. 340 (C. C. A.), 127 Fed. 99.

55. R. S., §§ 998, 999. Compare also Jacobs v. George, 150 U. S. 415.

56. Norcross v. Nave, 4 Am. B. R. 317, 101 Fed. 796.

57. Cunningham v. Bank, ante.

58. In re Meyers, 5 Am. B. R. 4, 105 Fed. 353.

59. Boonville, etc. v. Blakey, ante.

60. In re Dickson, ante.

Subs. b.]

Appeals to Supreme Court.

by an application to the judge below for a *supersedeas*.<sup>61</sup> In conformity with the rule in equity the circuit court of appeals will not interfere with findings of facts by a referee, affirmed by a district court, unless the findings are clearly erroneous, or, as it is sometimes expressed, manifestly against the weight of evidence.<sup>61a</sup>

## II. Subs. b. APPEALS TO THE SUPREME COURT.

**From a Circuit Court of Appeals.**—Appeals to the Supreme Court of the United States are, in bankruptcy, limited to controversies on claims of over \$2,000,<sup>62</sup> where a federal question, so-called, is involved, or, if no such question is involved, where a justice of that court has certified that the decision of the question in controversy “is essential to the uniform construction of the act throughout the United States.” Section 6 of the Act of March 3, 1891, establishing the circuit courts of appeals, has no relation to the revisory power conferred by § 24-b of the Bankruptcy Act, and parties having elected to litigate in such court under that section, the proceedings, terminate there, unless the case is one arising under § 25-b, and is properly certified to the Supreme Court as therein required.<sup>62a</sup> An order of the district court allowing an exemption in bankruptcy proceedings is not “a final decision allowing or rejecting a claim,” within the meaning of subsection b, and an appeal from a decision of the circuit court of appeals in respect thereto does not lie to the Supreme Court.<sup>62b</sup>

**Practice.**—This method of appeal is regulated by General Order XXXVI (2) (3),<sup>63</sup> and, after the case is in the Supreme Court, by the rules of that court. Cases interpreting these rules should also

61. See R. S., § 1007; Covington Stock Yards v. Keith, 121 U. S. 248; Adams v. Lane, 16 How. 148; French v. Shoemaker, 12 Wall. 86; Hunt v. Oliver, 109 U. S. 177; Texas, etc., Co. v. Murphy, 111 U. S. 488.

61a. In re Noyes, 11 Am. B. R. 506 (C. C. A.), 127 Fed. 286; Burleigh v. Foreman, 12 Am. B. R. 88 (C. C. A.), 130 Fed. 13.

62. The plain purport of the act seems to limit an appeal by a certificate of a justice of the Supreme Court to a claim in controversy which exceeds the sum of \$2,000. See

Hutchinson v. Otis, 10 Am. B. R. 275 (C. C. A.), 123 Fed. 14; Barrie v. Barrie, 5 How. (U. S.) 103; Gordon v. Ogden, 3 Pet. (U. S.) 33.

62a. Hutchinson v. Otis, 10 Am. B. R. 275, 123 Fed. 14.

62b. Holden v. Stratton, 10 Am. B. R. 786, 191 U. S. 115.

63. See Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, for meaning of this general order. For forms, see any of works on federal practice, for instance, Desty's Federal Procedure, 9th ed., Vol. IV.

be consulted. As yet there are no precedents under the present bankruptcy law. This method of reviewing the judgment of a circuit court of appeals is, because of the limitations hedging it in, very rare.

### III. Subs. c. NO APPEAL BOND REQUIRED OF TRUSTEE WHO APPEALS.

**In General.**—The words of the statute are clear. Appeal bonds are required from all appellants save trustees. Appeal bonds are not required on petitions to revise. It would seem that this subsection applies also to writs of error from the highest courts of the States.

### IV. Subs. d. CERTIFICATE AND CERTIORARI.

**Certificates to the Supreme Court.**—Here the reference is clearly to the Evarts Act.<sup>64</sup> This power may be exercised by either a circuit court of appeals or a district court. If from the district court, the question certified must be after final judgment,<sup>65</sup> and one of jurisdiction;<sup>66</sup> the certificate is a matter of right, provided a jurisdictional question has been decided. If from the circuit court of appeals, any question on which the court desires instruction may be certified up; but the certificate is discretionary. It seems also that here a final judgment is not necessary.<sup>67</sup> Such certificates bring up only questions of law.<sup>68</sup> The practice and precedents are already numerous,<sup>69</sup> though there are few cases which originated in bankruptcy.

**Writs of Certiorari from the Supreme Court.**—Here again the reference is to the Evarts Act. Such a writ (*a*) can be directed to the circuit court of appeals only, and (*b*) may be asked only in those cases where the ultimate decision of that court is final. While the Supreme Court has often disclaimed an intention to use this writ,<sup>70</sup>

64. Act of March 3, 1891.

65. *Bardes v. Bank*, 3 Am. B. R. 680, 175 U. S. 526.

66. *First Nat. Bank v. Klug*, 186 U. S. 203, 8 Am. B. R. 12; *Columbia Iron Works v. National Lead Co.*, 11 Am. B. R. 340 (C. C. A.), 127 Fed. 99. See also *Van Wagenen v. Sewall*, 160 U. S. 369; *Maynard v. Hecht*, 151 U. S. 324; *McLesh v. Roff*, 141 U. S. 661.

67. *Duff v. Carrier*, 55 Fed. 433.

68. *Warner v. New Orleans*, 167 U. S. 467; *Cross v. Evans*, 167 U. S. 60.

69. For instance, *Columbus Watch Co. v. Robbins*, 148 U. S. 266. For forms, see *Desty's Federal Procedure*, 9th ed., Vol. IV.

70. See *Forsyth v. Hammond*, 166 U. S. 506.

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Subs. d.]	Certificate and Certiorari.
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it has grown quite common. The statute gives the court a wide discretion as to time,<sup>71</sup> but, as a rule, such a writ should not be asked until a final decision is had below. The application is by petition to the Supreme Court, accompanied by a printed record of the case, and the question on which the writ is desired is, after due notice, moved on a motion day and submitted by written briefs. The effect of the writ, if granted, is to remove the question to the Supreme Court; and it is thereafter proceeded with there, as if brought up on an appeal.<sup>72</sup> The precedents on *certiorari* under the Evarts Act are already numerous and may be consulted with profit.<sup>73</sup>

<sup>71</sup>. Compare *The Conqueror*, 166 U. S. 110. *Bew v. U. S.*, 144 U. S. 58; *Chicago, etc. v. Osborne*, 146 U. S. 354. For

<sup>72</sup>. *Hubbard v. Tod*, 171 U. S. 474. forms, see *Desty's Federal Procedure*, 9th ed., Vol. IV.

<sup>73</sup>. *American Const. Co. v. Jacksonville, etc.*, 148 U. S. 372; *Lav Ow*

## SECTION TWENTY-SIX.

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### ARBITRATION OF CONTROVERSIES.

§ 26. **Arbitration of Controversies.**—*a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

*b* Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

*c* The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

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**Analogous provisions:** In U. S.: Act of 1867, § 17, R. S., § 5061; Act of 1800, § 43.

In Eng.: Act of 1883, § 57 (6).

**Cross references:** To the law: §§ 2 (7); 27.

To the General Orders: XXXIII.

To the Forms: None.

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### SYNOPSIS OF SECTION.

**I. Subs. a. Arbitration.**

Scope and Practice.

**II. Subs. b. Arbitrators, how Chosen.**

In General.

**III. Subs. c. Effect of Arbitration.**

Like a Verdict of a Jury.

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### I. Subs. a. ARBITRATION.

**Scope and Practice.**—“Any controversy arising in the settlement of the estate” may be submitted to arbitration. This section pro-

Subs. a, b, c.]

Scope and Practice; Effect.

vides a means to judgment by lay judges. It resembles a similar practice in most of the States; and is availed of as rarely. Under the English law, no application to court is necessary; the trustee may submit to arbitration, if the committee of inspection consent.<sup>1</sup> With us, the direction of the court must first be obtained. The proceeding is initiated by a petition, which should specify "the subject-matter of the controversy and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise."<sup>2</sup> Both the law and general orders are silent as to what notice is required; the analogies of the statute suggest the same notice as that required on the settlement of controversies.<sup>3</sup> The notice should, however, take the form of an order to show cause. The granting of the order is discretionary. Under the former law, it could not be addressed to the register.<sup>4</sup> Now it can, and almost invariably will be, to the referee.<sup>5</sup>

## II. Subs. b. ARBITRATORS, HOW CHOSEN.

**In General.**—Here the statute requires no elucidation. It is construed strictly. The arbitrators must be chosen in one of the ways indicated, or their finding will be set aside.<sup>6</sup> Once chosen, the practice thereafter should conform to that on arbitrations in the state courts. The inquiry is necessarily somewhat informal, but the findings must be reduced to writing and signed by the arbitrators, or a majority of them.<sup>7</sup> It should be filed, not with the referee, but in the district court clerk's office.

## III. Subs. c. EFFECT OF ARBITRATION.

**Like a Verdict of a Jury.**—The findings when filed become in effect the verdict of a jury. They need not be formally approved by the court. But they may be set aside by the district judge;<sup>8</sup> they are also subject to review in the same way a verdict is. If not set aside by the judge or on appeal, the findings are *res adjudicata* on all parties to the proceeding, even in a collateral action.<sup>9</sup>

1. Act of 1883, § 57 (6).

2. General Order XXXIII.

3. See § 58-a (7). Note also *In re Hoole*, 3 Fed. 496.

4. *In re Graves*, Fed. Cas. 5,709.

5. § 38-a (4).

6. *In re McLam*, 3 Am. B. R. 245, 97 Fed. 922. See also *In re Dibblee*, Fed. Cas. 3,885.

7. § 26-c.

8. *In re McLam*, *supra*.

9. *Johnson v. Worden*, 13 N. B. R. 355.

## SECTION TWENTY-SEVEN.

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### COMPROMISES.

§ 27. **Compromises.**— *a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

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**Analogous provisions:** In U. S.: Act of 1867, § 14, R. S., § 5061; Act of 1841, § 11.

In Eng.: Act of 1883, § 57 (7).

**Cross references:** To the law: §§ 2 (7); 26; 58-a (7).

To the General Orders: XXVIII, XXXIII.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. **Compromises.**

Scope of Section.

Practice.

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#### I. **COMPROMISES.**

**Scope of Section.**— This section should not be confused with § 12 on compositions. It is intended to supply a summary and inexpensive way of settling questions arising in the administration of bankruptcy estates. It is most often used in connection with contests on claims filed against the estate, or the contested collections of claims due the estate. It cannot, of course, be resorted to where the matter in controversy is the right to a discharge. But any controversy arising in the administration of the estate may be compromised.



**Practice.**—Here also the proceeding is initiated by a petition, which may be made by the trustee, the bankrupt, or a creditor.<sup>1</sup> It should be filed with the referee, if the case has been referred. The subject-matter of the controversy and the reasons why there should be a compromise must be clearly and distinctly set forth.<sup>2</sup> The referee, on the filing of such a petition, sets a day and place for the hearing and gives notice to all creditors and persons interested, in the usual way.<sup>3</sup> The notice should also contain a direction to show cause why the proposed compromise should not be allowed. The hearing is before the referee, not the judge, and conforms to like hearings on similar notice or order. The compromise must be "with the approval of the court," which means that even the action of the creditors on the proposition is not final.<sup>4</sup> The referee may disapprove their action. His decision may be reviewed by the district judge, on proper and timely application.<sup>5</sup> Compromises are often agreed to informally at meetings of creditors where more than a majority in number and amount are present. This practice is, however, unsafe, as the section is construed strictly.<sup>6</sup> The reported cases are few and, other than those previously referred to, are set out in the foot-note.<sup>7</sup>

1. General Order XXVIII.

2. Compare General Order XXXIII.

3. Though the general order seems to leave the kind and duration of the notice to the referee, it should be by publication and mailing and one of ten days. See § 58-a (7)-b-c.

4. Note the reasons for this in *In re Heyman*, 5 Am. B. R. 808, 104 Fed. 677.

5. See General Order XXVII.

6. Compare *In re Dibblee*, Fed. Cas. 3,885; *Duff v. Hopkins*, 33 Fed. 599.

7. *In re Phelps*, 3 Am. B. R. 396; *Blight v. Ashley*, Fed. Cas. 1,541; *In re Franklin Fund, etc.*, Fed. Cas. 5,058; *In re Rowe*, Fed. Cas. 12,092; *In re Fireman's Ins. Co.*, Fed. Cas. 4,796; *In re Furbish*, Fed. Cas. 5,159; *In re Hoole*, 3 Fed. 496.

## SECTION TWENTY-EIGHT.

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### DESIGNATION OF NEWSPAPERS.

§ 28. **Designation of Newspapers.**—*a* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

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**Analogous provisions:** In U. S.: Act of 1867, § 11, as amended, R. S., § 5019; Act of 1841, § 7.

In Eng.: None.

**Cross references:** To the law: § 58-b.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Newspapers.

Comparative Legislation.

In General.

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#### I. NEWSPAPERS.

**Comparative Legislation.**—All bankruptcy notices in England are officially gazetted by the Board of Trade, and published, if in London, in the London "Gazette;" if elsewhere, in a local paper.<sup>1</sup> Under our law of 1867, the marshal attended to the publication,

1. Act of 1883, §§ 13, 20, etc. General Rules 280, 281, etc.

the paper being fixed by the judge before the amendment of 1874, and the papers, one or more, being designated by the marshal thereafter.<sup>2</sup> The present provision is, therefore, new. It makes for uniformity.

**In General.**—The result of this section has been a standing order in each district, specifying the newspaper in each county in which bankruptcy notices are required to be published. This general designation is in practice made by the judge. A referee, being also a court of bankruptcy in each case referred to him, can designate the paper in which the notice in that case shall be published, provided the judge shall not already have designated one for that county. It sometimes becomes wise to designate an additional newspaper in a particular case, as where partnership bankrupts reside in different districts. The judge or the referee is empowered so to do by the statute. The only notice which must be published is that of the first meeting.<sup>3</sup> After that, there is no publication, unless “the court shall direct.”

2. Act of 1867, § 11, R. S., § 5019.

3. See § 58-b. For effect of failure to publish, under the old law, see *In re Hall*, Fed. Cas. 5,922. For effect

of publication under law of 1898, see under Section Fifty-eight, post, and compare *Smith v. Brinkerhoff*, 6 N. Y. 305.

## SECTION TWENTY-NINE.

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### OFFENSES.

§ 29. **Offenses.**— *a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

*b* A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

*c* A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

*d* A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

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§ 29.]           Synopsis of Section; Comparative Legislation.

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**Analogous provisions:** In U. S.: *As to offenses by the bankrupt*, Act of 1867, § 44, R. S., § 5132; *As to offenses by officers or others*, Act of 1867, §§ 45, 46, R. S., § 5012.

In Eng.: Debtors Act of 1869, Part II.

**Cross references:** To the law: §§ 1 (22); 2 (4); 7; 14-b; 23-c; 39; 47.

To the General Orders: None.

To the Forms: None.

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SYNOPSIS OF SECTION.

**I. Bankruptcy Crimes.**

Comparative Legislation.

Jurisdiction.

Indictment or Information.

Practice in General.

**II. Subs. a. Offenses by a Trustee and Punishment.**

What Constitutes the Offense.

Punishment.

**III. Subs. b. Offenses by Others than Officers and Punishment.**  
By a Bankrupt.

*Concealment of Property.*

*False Oath.*

*Punishment.*

By Others.

*Presenting a False Claim.*

*Receiving Property with Intent to Defeat the Act.*

*Extorting Money.*

Punishment.

**IV. Subs. c. Offenses by a Referee and Punishment.**

In General.

Punishment.

**V. Subs. d. Limitation on Prosecution.**

No Prosecution after One Year.

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I. BANKRUPTCY CRIMES.

**Comparative Legislation.**—An enumeration of offenses is properly no part of a bankruptcy law. The Debtors Act of 1869 in England gives a long catalogue of acts or omissions on the part

of the bankrupt which constitute crimes punishable by imprisonment at hard labor for from one to two years.<sup>1</sup> Officers and other persons, indeed, even the bankrupt, may also be punished for other offenses, such as malfeasance in office or false swearing, under general statutes or the common law. This seems to have been the rule in this country prior to the Act of 1867. That statute<sup>2</sup> made many wrongful acts on the part of the bankrupt—some covered and some not by the present law—misdemeanors punishable by not to exceed three years' imprisonment; while any officer who intentionally took excessive fees<sup>3</sup> was liable to a like imprisonment, as well as a fine and the forfeiture of his office. But offenses against the law by others were not made crimes or misdemeanors by the statute. The present section differs greatly from those in the former law, and the older cases are comparatively of little value.

**Jurisdiction.**—The district court sitting in bankruptcy has jurisdiction to arraign, try, and punish any person who has committed any of the offenses enumerated in this section.<sup>4</sup> So has the circuit court.<sup>5</sup> So, it seems, have the state courts, under state laws making the same acts crimes.<sup>6</sup> Likewise, the federal courts in the exercise of their customary criminal jurisdiction, have power to try and punish for crimes committed in bankruptcy proceedings, other than those enumerated in the law.<sup>7</sup>

**Indictment or Information.**—The use of these words in § 29-d seems to indicate that a prosecution under this section can be by information.<sup>8</sup> Since *In re Wilson*,<sup>9</sup> and *Mackin v. U. S.*,<sup>10</sup> however, it may be doubted whether any offense referred to in subsections a and b—each one being a crime, rather than a misdemeanor—can be proceeded on save by indictment. The debtor being technically a bankrupt<sup>11</sup> from the time even an involuntary petition is filed, an indictment will lie before an adjudication.<sup>12</sup> All

1. See Baldwin on Bankruptcy, 8th ed., p. 490 et seq..

2. § 44, R. S., § 5132.

3. § 45, R. S., § 5012.

4. See § 2 (4).

5. See § 23-c.

6. *State v. Thompson*, 58 N. H. 270; *Commonwealth v. Walker*, 108 Mass. 309.

7. *U. S. v. Nichols*, Fed. Cas. 15,880. *Contra, Anon.*, Fed. Cas. 475.

8. *U. S. v. Block*, Fed. Cas. 14,609.

9. 114 U. S. 422.

10. 117 U. S. 348.

11. § 1 (4).

12. *U. S. v. Meyers*, Fed. Cas. 15,848.

Subs. a, b.]

By Trustees and Others.

matters necessary to constitute the offense must be clearly pleaded.<sup>13</sup> Useful precedents will be found in cases cited in the foot-note.<sup>14</sup> Cases construing those subsections of the law of 1867 which made the obtaining of property on credit on false representation an offense, are no longer in point. Such offenses can, however, still be punished by a proper proceeding under the state laws.

**Practice in General.**—There being no rules or forms prescribed for the practice under this section, that practice should conform to criminal proceedings other than in bankruptcy in the court where the trial is had.

## II. Subs. a. OFFENSES BY A TRUSTEE AND PUNISHMENT.

**What Constitutes the Offense.**—Subsection a is new. Its purpose is plain, and the words used are of such simple yet comprehensive meaning as to cover every intentional withholding of or parting with the property of the estate, or the concealment or destruction of a document, by a trustee. The words "transfer,"<sup>15</sup> "document,"<sup>16</sup> and "trustee"<sup>17</sup> have enlarged meanings in this law. That the act was "knowingly and fraudulently" done must be distinctly charged and clearly proven. It seems also that a trustee may commit the offense specified in § 29-b (2).<sup>18</sup>

**Punishment.**—The penalty under subsection a is imprisonment, and the only limitation is that the time shall not be more than five years.

## III. Subs. b. OFFENSES BY OTHER THAN OFFICERS AND PUNISHMENT.

**By a Bankrupt.**—This subject has already been discussed elsewhere.<sup>19</sup> Any offense which, if committed by a bankrupt, can be

13. Bartlett v. U. S., 5 Am. B. R. 678, 106 Fed. 884; U. S. v. Prescott, Fed. Cas. 16,084.  
 14. U. S. v. Chapman, Fed. Cas. 14,784; U. S. v. Crane, Fed. Cas. 14,887; U. S. v. Latorre, Fed. Cas. 15,567; U. S. v. Jackson, 2 Fed. 502; U. S. v. Lake, 12 Am. B. R. 270, 129 Fed. 499 (sustaining allegation as to false oath to schedules by an officer of a corporation).  
 15. § 1 (25).  
 16. § 1 (13).  
 17. § 1 (26).  
 18. See in this Section, post.  
 19. See generally under Section Fourteen of this work.

punished under this subsection is also an objection to his discharge. Under the rule that a penal statute must be strictly construed, the word "person" as used in clause b of this section does not include an officer of a corporation which is declared a bankrupt.<sup>19a</sup>

*Concealment of Property.*—The somewhat elastic meaning of "conceal" should be borne in mind.<sup>20</sup> So also should the well-recognized doctrine of "continuing concealment."<sup>21</sup> Likewise, the necessity of charging and proving that the act was "knowingly and fraudulently" done.<sup>22</sup> Concealment of property was also an offense under the former law, and the cases then decided will be found valuable.<sup>23</sup> Those under the present law are already numerous; the more important are cited under Section Fourteen. Not every concealment which is sufficient to bar a discharge will, however, result in an indictment and conviction. Pleading and proof must, as a rule, be more strict where the bankrupt is put on trial for a crime. The offense of fraudulently concealing assets is committed where the bankrupt dishonestly applies money or property to his own use or purposes so that he himself or some other person whom he may desire to benefit receives advantage and profit by the concealment; the application of money in good faith to the payment of a debt after a petition in voluntary bankruptcy is filed does not necessarily constitute a fraudulent concealment, although as a result of the payment the creditor receives an undue advantage.<sup>23a</sup> But a concealment of property by a voluntary bankrupt after he has filed his petition and before the appointment of a trustee is an offense under this section.<sup>23b</sup>

*False Oath.*—The insertion of this common-law offense in the statute is new. The false oath must have been "knowingly and fraudulently" made.<sup>23c</sup> What is a "false oath" in bankruptcy is considered elsewhere.<sup>24</sup> The making of a false oath is a crime, whether in or out of a bankruptcy proceeding; the making of a

19a. *United States v. Lake*, 12 Am. B. R. 270, 129 Fed. 499.

20. § 1 (22).

21. See p. 177, ante.

22. See pp. 176, 177, ante.

23. Consult Vol. 6, Am. Dig., Century ed., "Bankruptcy," § 735.

23a. *U. S. v. Lowenstein*, 11 Am. B. R. 134, 126 Fed. 884.

23b. *U. S. v. Goldstein*, 12 Am. B. R. 755.

23c. *National Bank of Louisville v. Carley*, 12 Am. B. R. 119 (C. C. A.), 127 Fed. 686.

24. See pp. 178, 179, ante.



Subs. b.]

Presenting False Claim.

"false account" is not. These latter words when applied to a debtor are not important, as an unverified account by the bankrupt is practically unknown. Not so where the false account is filed by the trustee or receiver; it is often not verified, but this would not save the guilty officer from the penalty of the statute. This subsection then refers to the perjury of, or the making of a false account in the proceeding by, any person. The precedents thus far are numerous and have already been collated and discussed.<sup>25</sup>

*Punishment.*—Here, too, the only punishment is by imprisonment; but the maximum is two, not five, years. If perjury is charged and the indictment is laid under the general law, the punishment prescribed by that law will, of course, follow a conviction.

**By Others.**—While the word "person"<sup>26</sup> includes the officers<sup>27</sup> named in the law, and thus any of the offenses enumerated in subsection b may be chargeable to an officer, yet the last three subdivisions of subsection b are manifestly intended to meet acts or omissions by others than the bankrupt or such officers. These subdivisions are new, and have as yet received little attention from the courts.

*Presenting a False Claim.*—The presenting of a false claim under oath against a bankrupt's estate is a crime. Though the clause is phrased somewhat awkwardly, it is thought that it applies to an attorney who presents such a claim in an ordinary proceeding, as well as in one for a composition. The intention clearly is to penalize the filing of false claims, and to make both the claimant and any one who acts in his stead in presenting the claim liable therefor. The words "used any such claim in composition" enlarge the scope of the clause in such proceedings; it may have been presented without knowledge of its falsity, but acted on, as by assenting to the offer of composition, after that fact became known. Knowledge of falsity is essential, but that the presentation or use was fraudulent does not seem a necessary element.

<sup>25</sup>. See under Section Fourteen of this work.

<sup>26</sup>. § 1 (19).

<sup>27</sup>. § 1 (18).

*Receiving Property with Intent to Defeat the Act.*—The elements of pleading and proof here are: (a) The receipt of a material amount of property belonging to the bankrupt, (b) after the filing of the petition, and (c) with intent to defeat the act. This offense can, therefore, not be committed by one who is the conscious beneficiary of a fraudulent transfer or preference before bankruptcy,<sup>28</sup> though intent to defeat the act is palpable. On the other hand, only intent, not also the result, need be shown. But intent will never be presumed where the acts complained of are made the foundation of an indictment; it must be proved. This offense will, in the nature of things, be rare, and occur only in involuntary cases before actual adjudication.

*Extorting Money.*—The fifth subdivision is clearly aimed at those creditors who seek an advantage as a consideration for consenting to a proposed composition. It may, of course, be availed of where pressure, including a money payment, is exerted, resulting in the withdrawal of objections to a discharge. Whether it is available where a debt is not proven in consideration of a new promise may be doubted; such a new promise is neither money nor property. Cases are conceivable, too, where the bankrupt may commit this offense. The broad meaning of "person" should be remembered.<sup>29</sup> The mere attempt to extort is enough. There are no cases as yet under this subdivision. Its meaning and value seem not yet appreciated by creditors or the courts.

**Punishment.**—The punishment for either of these offenses, like those committed by the bankrupt, is imprisonment for not more than two years.

#### IV. Subs. c. OFFENSES BY A REFEREE AND PUNISHMENT.

**In General.**—The former law penalized the taking of unlawful fees. This subsection is, therefore, new. There are no cases yet reported under it. For what will make a referee "directly or indirectly interested," see under Section Thirty-nine, *post*; also, for what constitutes his duty as to giving information. But the offense defined in subdivision (3) cannot be committed until the referee

<sup>28</sup>. See *Wayne Knitting Mills v. Court*, *Mueller v. Nugent*, 181 U. S. Nugent, 4 Am. B. R. 747, 104 Fed. 1, 7 Am. B. R. 224.  
<sup>29</sup>. Compare also s. c., in Supreme 530. § 1 (19).

Subs. c, d.]

Limitation on Prosecutions.

has been directed by the court, which here means the judge, to permit the inspection.

**Punishment.**— Here the punishment does not involve imprisonment; but ousts the guilty officer from office and makes him liable to a fine of not more than \$500. This offense is, therefore, not an infamous crime.<sup>30</sup>

V. Subs. d. LIMITATION ON PROSECUTION.

**No Prosecution after One Year.**— The limitation here is absolute. The indictment must be found or the information filed within one year after the commission of the offense.

<sup>30</sup>. Compare U. S. v. Block, ante.

## SECTION THIRTY.

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### RULES, FORMS, AND ORDERS.

§ 30. **Rules, Forms, and Orders.**— *a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

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**Analogous provisions:** In U. S.: Act of 1867, § 10.

In Eng.: Act of 1883, § 127.

**Cross references:** To the law: None.

To the General Orders: All.

To the Forms: All.

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### SYNOPSIS OF SECTION.

#### I. Rules, Forms, and Orders.

Comparative Legislation and Meaning of Section.

Those Prescribed Should be Followed.

Supplemental Rules and Forms.

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#### I. RULES, FORMS, AND ORDERS.

**Comparative Legislation and Meaning of Section.**— The English bankruptcy law authorizes the Lord Chancellor, with the concurrence of the President of the Board of Trade, to make, revoke, and alter general rules in bankruptcy, which, when laid before Parliament, have the same effect as if previously enacted by that body.<sup>1</sup> The general rules in England are, therefore, as much law as the statute. Our system does not permit judicial legislation of

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1. Act of 1883, § 127.

§ 30.]

Should be Followed; Supplemental Rules, etc.

this character. The former act gave the justices of the Supreme Court power to frame general orders for a variety of purposes.<sup>2</sup> The orders then framed and the forms prescribed for carrying them out have been used as models for those now in vogue.<sup>3</sup> The purpose is, of course, to accomplish uniformity in practice throughout the States.<sup>4</sup>

**Those Prescribed Should be Followed.**—This has been distinctly held,<sup>5</sup> and filing has been refused to papers not in accordance with the official forms.<sup>6</sup> But the general orders are not always in tune with the law; and the forms show a want of harmony at times both with the law and the general orders. In such cases, the law, of course, controls;<sup>7</sup> our general orders and forms have not the effect of law,<sup>8</sup> much less the abrogation of law.

**Supplemental Rules and Forms.**—The general orders are intended only to confine the practice in bankruptcy within certain broad limits. They are not exclusive, and most of the district courts have prescribed supplemental rules; these should always be consulted. Even these have not always been found sufficient, and local rules are sometimes promulgated by the referees.<sup>9</sup> Likewise of the forms. Some of the more valuable, as well as many new ones suggested by experience, will be found under "Supplementary Forms," *post*. Where there is no rule to the contrary, or official form which is applicable, they may be used. Existing forms, too, may often be modified to fit a particular case; so, also, two or more prescribed forms may be combined.<sup>10</sup> The goal to be reached is the important consideration. If without much violence done to prescribed rules and forms, the practitioner does so, he need concern himself as little about a technical observance of them as the court will with a captious objection on the other side.<sup>11</sup>

2. Act of 1867, § 10.

3. See Bump on Bankruptcy, 9th ed., and General Orders and Forms therein.

4. Savings Bank v. Bank, Fed. Cas. 12,919.

5. In re Scott, 3 Am. B. R. 625, 99 Fed. 404.

6. Mahoney v. Ward, 3 Am. B. R. 770, 100 Fed. 278.

7. See In re Soper, 1 Am. B. R. 193. See also comments and discussions of rules and forms at the various conventions of referees in

bankruptcy, 1 N. B. N. 435-438; also 2 N. B. N. Rep., Number for Oct. 1, 1900, pp. 29-32.

8. West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463. Compare In re Baxter, Fed. Cas. 1,121.

9. For those in force in the writer's district, see 1 N. B. N. 112-116. See also Samson v. Burton, Fed. Cas. 12,285.

10. Mather v. Coe, 1 Am. B. R. 504, 92 Fed. 333.

11. Compare In re Paige, 3 Am. B. R. 679, 99 Fed. 538.

## SECTION THIRTY-ONE.

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### COMPUTATION OF TIME.

§ 31. **Computation of Time.**— *a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

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**Analogous provisions:** In U. S.: Act of 1867, § 48, R. S., § 5013.

In Eng.: Act of 1883, § 141, General Rule 4.

**Cross references:** To the law: §§ 3-a (3)-b (1); 7 (8); 13; 14-a; 15; 18; 25-a; 57-n; 58; 60; 64-b (4); 65; 66; 67; 70.

To the General Orders: Generally to all that prescribe a time limitation.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Computation of Time.

In General.

By Months and Years.

By Days.

By Fractions of a Day.

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#### I. COMPUTATION OF TIME.

**In General.**—The rule here stated is familiar. The English law is similar.<sup>1</sup> The law of 1867 differed only in the words prescribing what days were holidays.<sup>2</sup> This the present statute does elsewhere.<sup>3</sup> But the rule does not permit the exclusion of Sundays or holidays, save those coincident with the "day last included."<sup>4</sup>

1. Act of 1883, § 141.

2. § 48, R. S., § 5013.

3. § 1 (14).

4. Compare *In re York*, Fed. Cas. 18,139.

§ 31.]

By Months and Years; By Days, etc.

**By Months and Years.**—The phrases “four months” and “one year” are frequent in the act. The present section speaks only of “time enumerated by days.” Under the former statute, however, it was held that the same rule applied when the time was enumerated by months and years.<sup>5</sup> So also under the law of 1898.<sup>6</sup>

**By Days.**—Here the statute is self-explanatory. Time limitations, based on days, are found in many sections;<sup>7</sup> also in some of the general orders.<sup>8</sup> Cases on the timely filing of petitions will be found in the foot-note.<sup>9</sup>

**By Fractions of a Day.**—Here the rule seems to be that fractions of a day will be disregarded. This doctrine is the composite of an ancient controversy. Cases under the present law and its predecessor cited in the foot-note<sup>10</sup> will, therefore, lead the investigator into the domain of history. There can now, however, be no question about the rule being as stated.

5. In re Lang, Fed. Cas. 8,056; 66, 94 Fed. 110; In re Dupree, 97 Cooley v. Cook, 125 Mass. 406. Fed. 28; Leidigh Carriage Co. v.

6. Compare In re Stevenson, 2 Stengel, 2 Am. B. R. 383, 95 Fed. Am. B. R. 66, 94 Fed. 110. 637; In re Stoner, 5 Am. B. R. 402,

7. Thus, see In re Wolf, 2 Am. B. 105 Fed. 752; Jones v. Stevens, 5 Am. R. 322, 94 Fed. 382. B. R. 571, disapproving of Westbrook

8. See In re Scott, 3 Am. B. R. Mfg. Co. v. Grant, 60 Me. 88; In re 625, 99 Fed. 404. Tonawanda St. Planing Mill Co., 6

9. In re Rogers, Fed. Cas. 12,003; Am. B. R. 38. And under the law of 1867, Dutcher v. Wright, 94 U. S. In re Lang, supra.

10. In re Stevenson, 2 Am. B. R. 553.

## SECTION THIRTY-TWO.

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### TRANSFER OF CASES.

**§ 32. Transfer of Cases.**—*a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

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**Analogous provisions:** In U. S.: None, save in General Order XVI, under the Act of 1867. See also R. S., § 5121.

**In Eng.:** Act of 1883, § 97; General Rules 18-26.

**Cross references:** To the law: §§ 2 (19); 5.

**To the General Orders:** VI, VIII.

**To the Forms:** None.

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### SYNOPSIS OF SECTION.

#### I. Transfer of Cases.

Meaning and Scope.

Illustrative Cases.

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#### I. TRANSFER OF CASES.

**Meaning and Scope.**—This section is intended to avoid conflicts of jurisdiction between the courts of different districts. Three different district courts might have jurisdiction, *i. e.*, where the bankrupt resides, where he has his domicile, and where he has his principal place of business.<sup>1</sup> Three petitions even might be filed, were the case involuntary. The possible complications increase

1. § 2.



when partnerships are considered. Therefore, the Supreme Court, under the former law, influenced doubtless by the analogy of the last clause of § 36 of that law, prescribed by rule<sup>2</sup> that the court first acquiring jurisdiction should keep it. This rule is now General Order VI, but with a sentence added to make it conform to the section under discussion. The latter is new. It seems intended to modify the hard and fast rule of seniority formerly applied, by permitting one of the courts having jurisdiction to relinquish it and to order a consolidation, if "for the convenience of parties in interest."<sup>3</sup> Jurisdiction so to do is conferred by § 2 (19). Save as modified by this section, however, the practice in vogue under the former law is continued under the present, and the court first acquiring jurisdiction will usually retain it and may stay the other court or courts from further proceeding until an adjudication is made or refused. The petitioners in the preferred district must proceed with diligence to secure their rights, for if there be an adjudication in another district, jurisdiction therein to administer the estate is obtained.<sup>3a</sup>

**Illustrative Cases.**—Where it is clearly not for the convenience of parties in interest, the court applied to should not relinquish jurisdiction.<sup>4</sup> Otherwise, the court first obtaining jurisdiction will proceed to adjudication and administration.<sup>5</sup>

2. See Act of 1867, General Order XVI.

3. Compare *In re Wixelbaum*, 3 Am. B. R. 392, 101 Fed. 228.

3a. *Matter of United Button Co.*, 12 Am. B. R. 761.

4. *In re Sears*, 7 Am. B. R. 279, 112 Fed. 58, as modified on another point by s. c., 8 Am. B. R. 713, 117 Fed. 294.

5. *Matter of United Button Co.*, 12 Am. B. R. 761; *In re Greenfield*, 42 How. Pr. (N. Y.) 469; *In re Penn.*, Fed. Cas. 10,927; *In re Boylan*, Fed. Cas. 1,757; *In re Boston, H. & E.*, etc., Fed. Cas. 1,678; *In re Leland*, Fed. Cas. 8,228; *Shearman v. Birmingham*, Fed. Cas. 12,733.

## SECTION THIRTY-THREE.

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### CREATION OF TWO OFFICES.

§ 33. Creation of Two Offices.— *a* The offices of referee and trustee are hereby created.

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Analogous provisions: In U. S.: Act of 1867, § 3, R. S., § 4993.

In Eng.: None.

Cross references: To the law: §§ 1 (7) (18) (21) (26); 18; 29; 34 to 43; 44 to 50; 58; 72.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Creation of Two Offices.

Comparative Legislation.

Referee and Trustee.

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#### I. CREATION OF TWO OFFICES.

**Comparative Legislation.**—The corresponding officers under the English system are registrars and trustees; under the law of 1867, registers and assignees.<sup>1</sup> No statute heretofore, however, has formally created the offices.

**Referee and Trustee.**—The statute elsewhere prescribes that the word “officer” shall include clerk, marshal, receiver, referee, and trustee.<sup>2</sup> The two former existed before the law was passed; the third comes into being only in those cases where the court finds him necessary and appoints him.<sup>3</sup> It is a little difficult to under-

1. § 3, R. S., § 4993.

2. § 1 (18).

3. § 2 (3) (15).

stand why this section was necessary; § 34 provides for the appointment of referees, § 44 of trustees. Each, though thus an officer, has but intermittent functions. The effect of this doctrine on the limitations of § 72 is considered later.<sup>4</sup> The referee is formally designated for a specified term,<sup>5</sup> and is vested with powers only as to such cases as have been referred to him. The trustee is, save for this section, not an officer at all, but a liquidator, appointed by the creditors.<sup>6</sup> For the jurisdiction, duties, and compensation of these officers, and the like, reference should be had to the succeeding sections.<sup>7</sup>

4. See Section Seventy-two of this work.

5. § 34 (1).

6. § 44.

7. §§ 34-50.

## SECTION THIRTY-FOUR.

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### APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.

#### § 34. Appointment, Removal, and Districts of Referees.—

*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

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**Analogous provisions:** In U. S.: *As to appointment*, Act of 1867, § 3, R. S., § 4993; Act of 1841, § 5; Act of 1800, § 2; *As to removal*, Act of 1867, § 5, R. S., § 4997.

**In Eng.:** None.

**Cross references:** To the law: §§ 1 (7) (21) (26); 18; 29; 34 to 43; 44 to 50; 58; 72.

**To the General Orders:** None.

**To the Forms:** None.

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### SYNOPSIS OF SECTION.

#### I. Appointment, Removal, and Districts of Referees.

Appointment.

Removal.

Term.

Limits of District.

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#### I. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES.

**Appointment.**— Under the present law, the judge of each district appoints the referees. By the former law, the registers were appointed by him, but on the nomination of the Chief Justice.<sup>1</sup> The appointment is usually in the form of a court order, designating the limits of the referee's district and his term of office. From

1. § 3, R. S., § 4993.

that time and during such term all bankruptcy cases arising in his district are usually referred to him, unless he is absent, disqualified, or removed;<sup>2</sup> they may, however, for the convenience of parties, be referred to any referee within the territorial jurisdiction of the court.<sup>3</sup> If there is more than one referee in the referee district, the cases are distributed in such manner as the court directs.

**Removal.**—This is, like the appointment, discretionary. But it must be either because the services of a referee are not needed, or for other cause. The cause should be stated in the order of removal. It is not thought that the words “for cause” here give the right to notice and a hearing. As long as the judge finds the cause sufficient, it is enough.<sup>4</sup>

**Term.**—The register held office until the judge deemed his assistance unnecessary. The term of the referee is, however, fixed at two years. There is nothing in the statute which invalidates the acts of a referee after the expiration of his term. He continues a referee in each unclosed case previously referred. If removed, the order of removal will doubtless remove him as to such cases, too. Without any standing order of appointment, the court can continue to refer cases in his district to him, provided there is no other regularly appointed referee in his district, and the order of reference will in itself confer jurisdiction and be deemed an appointment to that extent.

**Limits of District.**—Under the former law, at least one register was appointed in each congressional district. This seems to have been dropped out when that law was fused into the Revised Statutes.<sup>5</sup> Now the referee district is fixed by the judge, but should be so that each county “may constitute at least one district.” This seems to mean that referee districts cannot be larger than a single county, a provision apparently ignored in many jurisdictions.<sup>6</sup> There is warrant, however, for the practice, for the judge may conclude that the services of a referee are not needed in a particular county and combine it with another county or counties into a single referee district.

2. Compare § 43.

3. See under Section Twenty-two of this work.

4. Compare *State v. Doherty*, 25 La. Ann. 119.

5. Act of 1867, § 3, R. S., § 4993.

6. It is well known that referee districts of two or three counties, or even of a score of counties, and in one case, the Southern District of Illinois, of a whole district, have been created under this seemingly inelastic clause.

## SECTION THIRTY-FIVE.

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### QUALIFICATIONS OF REFEREES.

§ 35. **Qualifications of Referees.**—*a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or Circuit Courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

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**Analogous provisions:** In U. S.: Act of 1867, § 3, R. S., §§ 4994, 4995.

In Eng.: None.

**Cross references:** To the law: §§ 1 (7) (21); 18-f-g; 33; 34; 36; 43; 50.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Qualifications of Referees.

In General.

Disqualification.

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#### I. QUALIFICATIONS OF REFEREES.

**In General.**—A referee is a judicial officer;<sup>1</sup> and this section sets proper limits on nepotism in his appointment or the enjoyment

1. Compare *White v. Schloerb*, 178 224; *Clendening v. Red River Valley* U. S. 542, 4 Am. B. R. 178; *Mueller Nat. Bank*, 11 Am. B. R. 245 (N. D. v. *Nugent*, 181 U. S. 1, 7 Am. B. R. Sup. Ct.).

by him of more than one office.<sup>2</sup> The former law contained no restriction save that the register must be a counselor-at-law of the district or the state courts.<sup>3</sup> Further restrictions were prescribed in his oath of office, and he was prohibited from acting as attorney or counselor in any bankruptcy case in his district, especially after the amendment of 1874.<sup>4</sup> Now a referee must be a (*a*) resident within the county for which he is appointed, and (*b*) competent to serve; (*c*) provided he does not hold any other office of profit or emolument (except certain offices here enumerated) or (*d*) is related to certain judicial officers of the United States by consanguinity or affinity within the third degree.

**Disqualification.**—Referees, although duly appointed, if not strictly within the terms of this section, would probably be disqualified to act at all. Disqualification often occurs in specific cases.<sup>5</sup> Whether he is disqualified is usually a matter either of discretion on the part of the judge or of conscience on the part of the referee. This matter is discussed elsewhere.<sup>6</sup>

2. In unpopulous districts, this is often a hardship, as a referee by this section is clearly disqualified from holding any other office, either legislative, executive, or municipal (with the exceptions specified in this section), provided it is one of profit or emolument. The restriction is, however, on the whole, a wise one. It is sufficiently unfortunate that referees must practice their profession as a means of livelihood, thus, one day sitting in judgment, the next perhaps

pleading in another court against him who was a pleader in the referee court but yesterday. They certainly should not exercise other functions of a political or public character.

3. Act of 1867, § 3, R. S., § 4994.

4. R. S., §§ 4995, 4995A.

5. Compare *Bray v. Cobb*, 1 Am. B. R. 153, 91 Fed. 102.

6. See under Sections Thirty-nine and Forty-three.

## SECTION THIRTY-SIX.

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### OATHS OF OFFICE OF REFEREES.

§ 36. **Oaths of Office of Referees.**—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

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**Analogous provisions:** In U. S.: Act of 1867, § 3, R. S., § 4995.

In Eng.: None.

**Cross references:** To the law: None.

To the General Orders: None.

To the Forms: No. 16.

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### I. OATH OF OFFICE OF REFEREES.

**In General.**—This provision emphasizes the difference between the register under the former law and the referee under the present. The register was merely an assistant to the judge, his functions largely clerical;<sup>1</sup> the referee is, in effect, in all cases referred to him, save in name and concerning a few matters reserved to the judge by the statute, a court of original jurisdiction.<sup>2</sup> Therefore, this section requires him to take the same oath as that taken by other federal judges.<sup>3</sup> It should be taken before the district judge.<sup>4</sup>

1. Act of 1867, § 3, R. S., § 4993.

2. For cases holding this, see under Section Thirty-nine.

3. This is the beautiful and historic

oath found in § 712 of the Revised Statutes, and from it incorporated into Form No. 16.

4. Form No. 16.



## SECTION THIRTY-SEVEN.

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### NUMBER OF REFEREES.

**§ 37. Number of Referees.**—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

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**Analogous provisions:** In U. S.: Act of 1867, § 3, R. S., § 4993.

In Eng.: None.

**Cross references:** To the law: § 34.

To the General Orders: None.

To the Forms: None.

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### I. NUMBER OF REFEREES.

**In General.**—This section should be read with § 34. The former act gave a like discretion.<sup>1</sup> The only limit on the number of referees in any given district is that only so many shall be appointed as may be necessary “to assist in expeditiously transacting the bankruptcy business” pending in such district.<sup>2</sup>

1. § 3, R. S., § 4993.

2. Save in large trade centers like Boston, and Baltimore, but one referee has, as a rule, been appointed New York, Chicago, Philadelphia, for each referee district.

## SECTION THIRTY-EIGHT.

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### JURISDICTION OF REFEREES.

§ 38. **Jurisdiction of Referees.**—*a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

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**Analogous provisions:** In U. S.: Act of 1867, § 4; R. S., §§ 4998, 4999, 5002, 5009.

In Eng.: § 99; General Rule 7.

**Cross references:** To the law: §§ 1 (7) (21); 2; 7 (9); 9-a; 11; 12; 14-a; 18; 20-a (1); 21; 22; 29-c; 34 to 43; 50; 55; 57; 58-c; 62; 64; 65.

To the General Orders: IX, XII, XXII.

To the Forms: Nos. 29, 56.

## SYNOPSIS OF SECTION.

**I. Jurisdiction of Referees.**

Comparative Legislation.

Scope and Meaning of Section.

**II. Express Powers.**

Subd. (1). To Make Adjudications or Dismiss Petitions.

*General Order XII.**Practice after Reference in Involuntary Cases.*

Subd. (2). To Administer Oaths, Conduct Examinations, etc.

Subd. (3). To Seize and Release Property.

Subd. (4). To Exercise Generally the Statutory Jurisdiction of the Judge, Except in Certain Matters.

*Jurisdiction over Discharges and Compositions.*

Subd. (5). To Authorize the Employment of Stenographers.

## I. JURISDICTION OF REFEREES.

**Comparative Legislation.**—The English Act of 1883 has a similar section.<sup>1</sup> The jurisdiction of registrars in bankruptcy is, however, both larger and smaller than that of our referees. They, as a rule, cannot act save on applications unopposed, yet they have the very important power of making interim orders in cases of urgency and, if of the High Court, may grant discharges and confirm compositions. Under our law of 1867, the registers had power to transact administrative or *ex parte* business,<sup>2</sup> but issues of law or fact were always heard by the judge.<sup>3</sup> A comparison of the two sections will indicate the great difference between their functions and those of the present referees.

**Scope and Meaning of Section.**—Manifestly this section is one of limitation. Unless jurisdiction is given or can reasonably be inferred from its words, it cannot, as a rule, be exercised by the referee.<sup>4</sup> However, the broad terms of subdivision (4) coupled with, in many districts, rules conferring on them all the powers and functions of the judge that are not by the statute or the general orders specifically reserved to the court proper, make the section almost unlimited in its scope, and read into it the numerous

1. § 99.

2. § 4, R. S., § 4908.

3. §§ 4 and 6, R. S., §§ 5009, 5010.

4. Other sections confer powers on

the referees, as, for instance, § 39.

But the intention seems to have been

to summarize all general grants of

jurisdiction here.

## To Make Adjudications or Dismiss Petitions.

[§ 38.]

other sections conferring jurisdiction on the court itself. The breadth and importance of these functions are discussed later.<sup>5</sup> It should be noted, however, that (a) this jurisdiction is territorial, *i. e.*, it must be exercised "within the limits of their districts;" and (b) it is always subject "to a review by the judge."<sup>6</sup> The findings of referees acting within their jurisdiction are entitled to the respect and credit given to officers acting judicially,<sup>6a</sup> and such findings are conclusive upon state courts.<sup>6b</sup> Some of the illustrative cases are summarized in the foot-note.<sup>7</sup>

## II. EXPRESS POWERS.

**Subd. (1). To Make Adjudications or Dismiss Petitions.**—Immediately on a reference made in the absence of the judge from the district or division,<sup>8</sup> the referee has jurisdiction to make the adjudication or dismiss the petition. This refers to involuntary as well as voluntary cases, and charges the referee with a distinct duty, which, where a petition does not show the jurisdictional facts, should result in a dismissal. A referee cannot, however, grant an adjudication in any other case.<sup>9</sup> The form used should be an adaptation of Forms Nos. 11 and 12.

*General Order XII.*—The Supreme Court has supplemented the statute with a rule which is in turn supplemented by the terms of Forms Nos. 14 and 15. The first paragraph of this general order requires the court to fix a day upon which the bankrupt shall attend before the referee, and provides that from that day the bankrupt shall be subject to his orders and that all proceedings shall thereafter be before the referee. This has sometimes been thought to withhold jurisdiction from the referee until the day set. The better opinion is that—the limitation on jurisdiction

5. See under Section Thirty-nine as well as this Section.

6. For reviews by the judge and practice thereon, see Section Thirty-nine of this work.

6a. *In re Covington*, 6 Am. B. R. 373, 110 Fed. 143; *In re Eagles*, 3 Am. B. R. 733, 99 Fed. 695.

6b. *Clendening v. Red River Valley Nat. Bank*, 11 Am. B. R. 245 (N. D. Sup. Ct.).

7. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *White v. Schloerb*, 178 U. S. 522, 3 Am. B. R. 178; *In re Steuer*, 5 Am. B. R. 209, 104 Fed.

976; *In re Scott*, 7 Am. B. R. 35; affirmed on review, *s. c.*, 7 Am. B. R. 39; *In re Huddleston*, 1 Am. B. R. 572. Compare also *Geisveiter v. Sevier*, 33 Ark. 522.

8. Compare § 18-f-g.

9. For effect of erroneous adjudication, if jurisdictional question is not promptly raised, see *In re Polakoff*, 1 Am. B. R. 358; *In re Chisdell*, 4 Am. B. R. 95, 101 Fed. 246. But see *In re Mason*, 3 Am. B. R. 599, 99 Fed. 256. Compare, under former law, *In re Penn*, Fed. Cas. 10,927.

## Subd. (1).] Practice after Reference in Involuntary Cases.

imposed being clearly against the manifest purpose of the statute to vest the referee with complete jurisdiction at once the order of reference is made—he immediately has power to exercise any of the functions or perform any of the duties prescribed, and even before the order of reference is actually received. The second paragraph of this general order is of little importance. Referees invariably fix the times and places when they will act. It would be both confusing and impracticable if the judges did so. In important districts the referee's court has a stated place for sittings, often specified by a standing order, and frequently in court-rooms or chambers set apart for them in the local federal building; the time is specified either by a general order or in each notice or order. The third paragraph supplements subdivision (4) of this section, and seems also to withdraw jurisdiction to grant injunctions from referees. As to the latter, it is doubted whether the rule is of any force save by way of suggestion.<sup>10</sup> As has been seen, referees are accustomed to grant temporary injunctions coupled with show causes returnable before the judge.<sup>11</sup> Without this power, irreparable injury would often be done to bankrupt estates, before the court's writ could be obtained from a distant clerk's office.<sup>12</sup>

*Practice after Reference in Involuntary Cases.*—On receiving or making an adjudication in an involuntary case, the referee should forthwith enter and have served on the bankrupt an order directing him to prepare and file his schedules as required by § 7 (8),<sup>13</sup> this that the case may be presently proceeded with, or, the bankrupt, if recalcitrant, reported in contempt. Where the bankrupt is absent or has absconded, it is customary first to call on his attorneys of record, if any, to prepare and file such schedules. Where he has none or they have not the facts to do this—the practice suggested by General Order IX being usually out of the question—the practice has grown up of issuing subpoenas to any or all persons who seem likely to know of the bankrupt's business affairs and, after an examination of them and the debtor's books, to make out as complete schedules as possible. To this end, the referee,

10. The referee is, unless there is something to the contrary in the context, the court. Compare *In re Cobb*, 7 Am. B. R. 203, 112 Fed. 655. The power to enjoin flows from either § 2 (15) or § 11, both of which see.

11. See Sections Two and Eleven.

12. See *In re Sabine*, 1 Am. B. R. 315; *In re Rogers*, 1 Am. B. R. 541; *In re Mussey*, 2 N. B. N. Rep. 113.

13. *In re Franklin Syndicate*, 4 Am. B. R. 244, 101 Fed. 402.

who is charged with this duty,<sup>14</sup> usually drafts the attorneys of the petitioning creditors as his assistants. Schedules so prepared should be in triplicate, but need not be verified; they will often require amendment. Not, however, until they are prepared and filed, should a first meeting be called. The expense of this preliminary proceeding is chargeable to the estate.

**Subd. (2). To Administer Oaths, Conduct Examinations, etc.—**

These powers would also flow from subdivision (4). The previous statute gave similar, though not as comprehensive, functions to the register.<sup>15</sup> The power to swear witnesses is distinct from that conferred on referees to administer the oaths "required by this act" by § 20-a (1). The formula used in swearing witnesses is similar to that in the local courts, but its phraseology should always be adapted to the proceeding or trial in which the witness is sworn. It has been held, although there are authorities to the contrary, that where the cases in which examinations are held are such that the referees are required to decide questions outright or draw conclusions from the evidence in the shape either of a report or an opinion, such referees may exclude such evidence as they deem inadmissible.<sup>16</sup> The power expressly conferred upon referees by subdivision 4 to perform "such part of the duties except, etc., as are by this act so conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts," would seem sufficient to authorize them to pass upon the competency, relevancy, or materiality of any question considered in the course of an examination. Rules have been promulgated in several of the districts conferring power in this regard.<sup>16a</sup> It being within the power of a referee to rule as to the admission of evidence it follows that he should be personally present to hear and conduct all the evidence and proceedings before him, unless in the case of purely formal evidence, his presence is waived.<sup>16b</sup>

14. § 39-a (6). But see General Order IX. Consult also Section Seven of this work.

15. § 4, R. S., § 4998.

16. *Matter of Wilde's Sons*, 11 Am. B. R. 714. See contra, *In re Lipset*, 9 Am. B. R. 32. In the case of *Dressell v. North State Lumber Co.*, 9 Am. B. R. 541, it was held that referees in bankruptcy in taking testimony are governed by the rules in equity and should not on simple ob-

jection excuse witnesses from answering questions, but should note the objections, and take the answer. See also *In re Gottardi*, 7 Am. B. R. 723. The practice on examination of the bankrupt is discussed on pages 112-116, ante.

16a. Rule 22, Western District of New York, quoted in full in note 65 on page 114.

16b. *Matter of Wilde's Sons*, 11 Am. B. R. 714.

Subd. (3), (4).] Seize and Release Property; General Jurisdiction.

Documents may be ordered in in the usual way. When the bankrupt is present, the direction is often verbal. If he is not present, or the document is in the possession of a third person, a subpoena *duces tecum*, or an order to the same effect, is customary. The concluding clause of this subdivision reserves to the judge the right to commit, and doubtless, therefore, to attach a balky witness.<sup>17</sup>

**Subd. (3). To Seize and Release Property.**— This subdivision seems to refer to a power to seize and hold property conferred upon the judge by § 69. A like power is suggested by § 3-e; and it seems, given by § 2 (15). This subdivision will, however, probably be construed as such a limitation on the general words of the two sections last mentioned as to prohibit the referee from exercising this jurisdiction, save in cases where the clerk has issued a certificate showing the inability of the judge to act for one of the reasons specified. The power is an important one in involuntary cases. It is apparently the only instance where the referee as such has jurisdiction before an order of reference. Perhaps the clerk's certificate has the effect of such an order.

**Subd. (4). To Exercise Generally the Statutory Jurisdiction of the Judge, except in Certain Matters.**— The exact effect of the words "and as shall be prescribed," etc., has not yet been authoritatively declared. "Jurisdiction" and "duties" are, of course, widely different things. While a court of bankruptcy may direct referees to perform "duties" not enumerated in § 39, it cannot by rule confer a "jurisdiction" it does not itself have. Further, this clause occurs in a section devoted to the "jurisdiction of referees." It seems to follow that "duties" is here used in the sense of jurisdiction; and, therefore, that to be vested with jurisdiction other than that expressly conferred by this section or charged with duties other than those set out in § 39, referees must be given such jurisdiction by a standing or special rule of the district court.<sup>18</sup> The question is not without difficulty and the opposite view seems sometimes to be taken for granted. It is not, however, often important. The district courts have quite generally supplied the necessary rule.<sup>19</sup> Under this clause, it has been held that the referee

17. See § 41.

18. See General Order XII (1), and see *In re Sabine*, 1 Am. B. R. 315, for a case where jurisdiction to stay

was exercised before there was any rule giving it.

19. Thus, the following rule was early promulgated in the Northern

may grant stays,<sup>20</sup> issue summary orders to compel restitution of property,<sup>21</sup> determine the ownership of property in the possession of a receiver where a third party files an intervening petition claiming the ownership of such property,<sup>21a</sup> and dismiss a petition on which an adjudication has already been had.<sup>22</sup> The numerous functions of a court of bankruptcy which, through this subdivision, may be performed by the referee are pointed out in the "cross-references." For the law and the practice in the exercise of them, reference should be had to the appropriate Sections of this work.

*Jurisdiction over Discharges and Compositions.*—The referee is denied jurisdiction of these important matters, as he is of adjudications save in the absence of the judge.<sup>23</sup> The words of the subdivision extend such limitation not only to applications for discharge or composition, but "to questions growing out of" the two specified proceedings. Thus, a referee has no jurisdiction over a proceeding for the revocation of a discharge or for setting aside a composition.<sup>24</sup> This limitation in actual practice is often one of nomenclature rather than fact. As previously observed, save when a jury trial is had, on objections to a discharge the referee usually sits on the case as a special master in chancery, and reports the facts and his opinion to the court for its guidance.<sup>25</sup> The practice on such references is discussed elsewhere.<sup>26</sup>

**Subd. (5). To Authorize the Employment of Stenographers.**—The purpose of this subdivision is clear—to permit the use of modern

District of New York, and adopted by the Western District of the same State:

XXVI. *Powers delegated to referees.* The referees heretofore or hereafter appointed for the Northern District of New York are hereby, respectively, vested with the jurisdiction which, by the bankruptcy act of July 1, 1898, and the general orders of the supreme court, promulgated at the October term of 1898, the court or judge may delegate to or confer upon said referees; and they are, respectively, empowered and authorized to do all acts, take all proceedings, make all orders and decrees, and perform all duties so authorized to be delegated by said act, and said general orders, without special authority

in each case and under the general authority conferred by this order.

20. See foot-note 13, ante.

21. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224. To justify an order that a bankrupt pay over money or deliver property to his trustee, the referee should find as a fact that the bankrupt, since filing his petition, had concealed and withheld from the trustee property belonging to the bankrupt estate. In *re Felson*, 10 Am. B. R. 716, 124 Fed. 288.

21a. In *re Schrinopskie*, 10 Am. B. R. 221.

22. In *re Scott*, 7 Am. B. R. 35.

23. § 18-e-f-g.

24. Consult Sections Thirteen and Fifteen.

25. See under Section Fourteen.

26. *Id.*



Subd. (5).]

Employment of Stenographer.

methods in preserving testimony. But, strictly, a stenographer will not be employed save "upon the application" of the trustee,<sup>27</sup> or there has been a stipulation of the parties or money has been deposited for the expense as provided by General Order X,<sup>27a</sup> though, it seems, the necessary expenses of a referee in perpetuating testimony may be called for in advance, and is probably an expense of administration.<sup>28</sup> In a proper case,<sup>29</sup> the referee will doubtless direct the trustee to make such an application. Where the taking of the testimony was necessary to the estate or resulted to its advantage, such an order can, it is thought, be made *nunc pro tunc*. The subdivision is also often supplemented by district or referee district rules.<sup>30</sup> This subdivision has been interpreted with great elasticity. The exigencies of speedy administration and the multitude of cases which have arisen in important jurisdictions early made the employment of regular stenographers imperative. It is thought that the very liberal interpretation of this subdivision thus far prevailing will continue. The method of taking testimony is prescribed by General Order XXII.

27. In re Carolina Cooperage Co., 3 Am. B. R. 154, 96 Fed. 950; In re Mammoth Pine Lumber Co., 8 Am. B. R. 651, 116 Fed. 731.

27a. In re Mammoth Pine Lumber Co., 8 Am. B. R. 651, 116 Fed. 731.

28. See General Orders X and XXXV (2); § 64-b (3).

29. Compare In re Todd, 6 Am. B. R. 88, 109 Fed. 265. See also In re Gerson, 1 Am. B. R. 251; In re Rozinsky, 3 Am. B. R. 830, 101 Fed. 229.

30. Thus, in the district of Referee Hotchkiss:

Rule 11. *Perpetuation of testimony.*

(1). The examination of the bankrupt and any witnesses at meetings of creditors or otherwise, and all testimony offered on contested claims, or for any other purpose, will be taken down by the official stenographer in the form of question and answer, and transcribed. One copy thereof will be inserted in the record book of the referee and the other copy will be delivered to the trustee. The expense of thus perpetuating testimony will be at the rate of ten

cents (10c.) a folio for both copies, and shall be paid as follows: Where there are no assets, for one reasonable examination on one day, by the bankrupt, and thereafter by the creditor or party in interest for whose benefit or at whose request such examination is had; where there are assets, as may be ordered by the referee in each particular case.

(2). After the testimony has been transcribed, the attorney in charge of the case will produce each witness before the referee, that such testimony may be signed, as provided in General Order XXII.

(3). If indemnity is not demanded, all moneys advanced by the referee in publishing or mailing notices, or for traveling expenses, or for procuring the attendance of witnesses, or in perpetuating testimony, or otherwise, shall be paid to the referee prior to, or at the time, application is made to him for the report or certificate called for by District Rule X (that on the bankrupt's application for a discharge).

## SECTION THIRTY-NINE.

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### DUTIES OF REFEREES.

§ 39. **Duties of Referees.**—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

*b* Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counsellors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

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§ 39.]                      Synopsis of Section; Duties of Referees.

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**Analogous provisions:** In U. S.: Act of 1867, §§ 4, 5; R. S., §§ 4998, 5000, 5001.

In Eng.: None.

**Cross references: To the law:.** *As to the declaration and payment of dividends, § 65; As to the filing of schedules, § 7 (8); As to furnishing information, § 29-c (3); As to the giving of notices, § 58; As to making up and transmitting records, §§ 2 (10), 42; As to the perpetuation of testimony, § 38; As to the employment of a stenographer, § 38 (5); As to offenses by and disqualifications of referees, §§ 29-b, 35.*

**To the General Orders:** IX, X, XII, XV, XVI, XX, XXI, XXII, XXIII, XXIV, XXVI, XXVII, XXXV.

**To the Forms:** Nos. 18, 28, 30, 40, 56.

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SYNOPSIS OF SECTION.

**I. Subs. a. Miscellaneous Duties of Referees.**

*In General.*

Subd. (1). To Declare Dividends and Prepare Dividend Sheets.

Subd. (2). To Examine Schedules, etc.

Subd. (3). To Furnish Information.

Subd. (4). To Give Notices.

Subds. (5) (7) (8). To Make up Records and Transmit Them or Copies to the Clerks.

*Reviews by the Judge.*

*Hearing of Reviews.*

Subd. (6). To Prepare and File Schedules in Certain Cases.

Subd. (9). To Preserve Evidence when no Stenographer is Present.

Subd. (10). To Call for Papers at the Clerk's Office.

**II. Subs. b. Prohibitions on Referees.**

Cannot Act in Cases where Interested.

Cannot Practice in Bankruptcy Proceedings.

Cannot Purchase Property of a Bankrupt Estate.

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**I. Subs. a. MISCELLANEOUS DUTIES OF REFEREES.**

**In General.**—There is nothing exactly similar to this section in previous statutes. Manifestly, it is in the nature of an appendix to § 38. Though captioned "Duties of Referees," some of its clauses confer jurisdiction. The more important duties of referees are

here enumerated. But the section is not exclusive,<sup>1</sup> even in its prohibitions stated in subsection b. The referee has many other duties. The only distinction between them and those here specified seems to be that, as to the former, he has some discretion; as to the latter, little, perhaps none.

**Subd. (1). To Declare Dividends and Prepare Dividend Sheets.**—This general subject is discussed under Section Sixty-five. In actual practice, dividend sheets are prepared by the trustee or his attorney, and checked over and verified by the referee. Form No. 40 may be used, or, better, a schedule somewhat like it, the same to be attached to and made a part of the formal order of distribution. By General Order XXIX, the referee is also required to countersign all dividend checks drawn by the trustee. Since the amendatory act of 1903, there must always be two dividends, if any.

**Subd. (2). To Examine Schedules, etc.**—This duty is an important one. It seems that the schedules are not a part of the petition.<sup>2</sup> They must, however, conform substantially to the law<sup>3</sup> and the forms.<sup>4</sup> Thus, the court proper is not called upon to investigate the sufficiency of the schedules. The referee must. If they seem incomplete or defective, he should suspend further proceedings until they are amended. *In re Mackey*,<sup>5</sup> an opinion by the author of the first and second editions of this work, is illuminating both as to the duties of the referee in such cases and concerning what are defects or omissions.

**Subd. (3). To Furnish Information.**—This subdivision should be read in connection with § 29-c (3), though mere failure to furnish information other than as there specified is not an offense. This duty clearly refers to replies to letters of inquiry, as well as to answers to oral questions and permission to inspect papers on file. Replies to letters may be franked. But it has been held that a referee is not required to furnish copies of papers.<sup>6</sup> The duty here enjoined is often a burden. Some referees have adopted forms for answers, especially where information is sought concerning the total of claims shown and assets scheduled.

1. See, for instance, §§ 55-b and 58-c.

2. *In re Patterson*, Fed. Cas. 10,815.

3. See § 7 (8).

4. Forms Nos. 1 and 2.

5. 1 Am. B. R. 593.

6. *In re Lewin*, 4 Am. B. R. 632, 103 Fed. 850.

Subs. a, (4), (5), (7), (8).] To Give Notices; To Make up Records.

**Subd. (4). To Give Notices.**— There is here an unimportant conflict with § 58-c. The referee should give all notices. Some of the more common notices are specified in § 58-a, which see. General Order XVI prescribes another notice that the referee is supposed to give, but which in actual practice is rarely found necessary.<sup>7</sup> As a rule, while the original notice must be signed by the referee, the clerical work of preparing and posting is done by the attorney in charge. In districts where no allowance was made for the giving of notices, such a practice has been necessary; if done by the referee, indemnity for the expense incurred can be demanded.<sup>8</sup> Whatever the method, the "official business" envelope can be used. This subject is also considered under Section Fifty-eight.

**Subds. (5) (7) (8). To Make up Records and Transmit Them or Copies to the Clerks.**— These subsections are largely supplemented by § 42, which see. The size and completeness of the record book there prescribed varies in the different districts; in some it is a mere docket, with brief entries indicating the meetings held and orders granted; in others a detailed running account of the whole proceeding from day to day. Subdivision (7) requires the referee to keep records and to transmit them to the clerk when the case is concluded.<sup>9</sup> Subdivision (8) provides for the transmission to the clerk of such papers on file with the referee, or copies thereof, as shall be needed in the court proper before the whole case is sent up as provided in the previous subsection. By General Order XXIV, referees are also required to transmit forthwith to the clerk a list of claims proven. This is an inheritance from the law of 1867,<sup>10</sup> does not fit into the present system of administration, serves no useful purpose, and is rarely observed.<sup>11</sup> The referee is also required to file monthly statements of disbursements with the judge.<sup>12</sup>

*Reviews by the Judge.*— Subdivision (5) seems to refer to such records as are needed on reviews, and should be read with General Order XXVII. A review should be asked by petition; if from an order, this is the only way.<sup>13</sup> There is no time limit set by the

7. See Form No. 24.

8. General Order X.

9. Compare § 42-c.

10. General Order XI, under Act of 1867.

11. In the writer's jurisdiction, a district rule makes the certification of

the whole record, including the list of claims, addresses, etc., proven, a sufficient observance of this general order.

12. General Order XXVI.

13. Compare General Order XXVII.

statute, but a review must be within a reasonable time;<sup>14</sup> this is usually fixed by a standing rule.<sup>15</sup> It seems that a review can be asked only after the granting of an order,<sup>16</sup> though it would seem that the referee may certify a specific question also.<sup>17</sup> The petition should clearly point out the error complained of, and ask a review. The latter is a matter of right. The referee's decisions on questions of fact or involving discretion will not ordinarily be interfered with.<sup>18</sup> Findings of fact by the referee are presumed to be correct until the contrary is shown, and the burden of proof rests with the persons objecting thereto.<sup>18a</sup> If the findings are manifestly erroneous, they may be set aside.<sup>18b</sup> The court will not consider for the first time questions not raised below, or issues not presented by the record.<sup>19</sup> But the court may review findings where certain testimony in the case appears to have been overlooked or ignored.<sup>19a</sup> The record usually consists of a certificate,<sup>20</sup> prepared and signed by the referee, which should state the question<sup>20a</sup> on which the review has been asked and the ruling of the referee, and, either in the certificate or in a schedule annexed to it, give the evidence or a

14. In re Chambers, 6 Am. B. R. 709; In re Russell, 5 Am. B. R. 566, 105 Fed. 501; In re Schiller, 2 Am. B. R. 190, 96 Fed. 403.

15. In the writer's (Referee Hotchkiss) jurisdiction, a review must be asked within ten days. See Erie County (N. Y.), Rule 16, 1 N. B. N. 115.

16. In re Schiller, *supra*; In re Chambers, *supra*. See also In re Hawley, 8 Am. B. R. 632, 116 Fed. 428.

17. In re Kelly Dry Goods Co., 4 Am. B. R. 528, 102 Fed. 747. Compare also Form No. 56.

18. In re Rider, 3 Am. B. R. 192, 96 Fed. 811; In re Waxelbaum, 4 Am. B. R. 120, 101 Fed. 228; In re Stout, 6 Am. B. R. 505, 109 Fed. 794; In re Carver & Co., 7 Am. B. R. 539, 113 Fed. 128; In re Royal, 7 Am. B. R. 636, 113 Fed. 140; In re Douglass, etc., Co., 8 Am. B. R. 113, 114 Fed. 772; In re West, 8 Am. B. R. 561, 116 Fed. 767; In re Shriver, 10 Am. B. R. 746, 125 Fed. 311.

18a. In re Williams, 9 Am. B. R. 731, 120 Fed. 542.

18b. In re Miner, 9 Am. B. R. 100, 117 Fed. 953. In the case of In re Swift, 9 Am. B. R. 237, 114 Fed. 941, Judge Lowell discusses the weight to be given to findings of fact made by a referee and intimates that where they depend upon inferences to be drawn from admitted facts, the court will exercise its own judgment as to whether such findings should be reversed. As to such findings he observes that the court may interfere, although they are not "clearly erroneous."

19. In re Richard, 2 Am. B. R. 506, 94 Fed. 643. But compare In re Woodard, 2 Am. B. R. 692, 95 Fed. 955. See also In re Sturgeon, Fed. Cas. 13,564.

19a. In re Grant Bros., 9 Am. B. R. 93, 118 Fed. 73.

20. See Form No. 56.

20a. The precise question ruled upon must be certified; this requirement is not complied with by a mere transmission to the clerk of the notes of testimony, the referee's opinion and the creditor's petition for review. In re Kurtz, 11 Am. B. R. 129, 125 Fed. 992.

Subs. a, (5), (6), (7), (8).] Hearing of Reviews; Schedules.

summary of it,<sup>20b</sup> and a copy of the order,<sup>21</sup> if any. The practice in the several districts necessarily varies as to the formalities to be observed in seeking a review by the judge of the orders or other proceedings of a referee; in some districts it is held sufficient to set out the substance of the matter in dispute without requiring the filing of formal exceptions to the referee's findings or rules.<sup>21a</sup> Documents also may be handed up; if so, they should be numbered and either referred to or summarized in the certificate. This subdivision implies that the evidence must be agreed upon by the parties to the review. It is presumable that, if they do not agree, the referee will either settle the record as justice requires or send up the whole case. He must make up this record himself. It seems he is entitled to no additional compensation for so doing. By analogy with other clauses of the law and the general orders, however, he is entitled to his expenses in preparing the same and to an indemnity therefor.<sup>22</sup>

*Hearing of Reviews.*—The referee must certify up a review "forthwith." It is usually brought on for hearing on notice of motion, and heard on any rule day, or, by consent of the judge, at any time.<sup>23</sup> The practice here is often fixed by district rules. Jurisdiction "to consider, confirm, modify, or overrule or return, with instructions for further proceedings," is conferred on the district court by § 2 (10). The order then made is entered in such court and a copy of it, with the papers on review, transmitted to the referee.<sup>24</sup>

**Subd. (6). To Prepare and File Schedules in Certain Cases.**—This duty of the referee has already been considered under Section Thirty-eight.

**20b.** General Order XXVII requires the referee to certify the question presented, "a summary of the evidence relating thereto, and the finding and order of the referee thereon." It has been held that the plain meaning of this order is to require the referee to make a summary of the evidence in order to save the judge "the labor of examining what is often a mass of testimony on many different questions, and of extracting so much as may be revelant to the point immediately in hand." In re Kurtz, 11 Am. B. R. 129, 125 Fed. 992.

**21.** For the necessary recitals in referees' orders, see General Order XXIII.

**21a.** In re Swift, 9 Am. B. R. 237, 114 Fed. 941.

**22.** See General Order X.

**23.** For an interesting case on practice, see In re Gottardi, 7 Am. B. R. 723.

**24.** For the use of this record on a petition or appeal from the judge to the Circuit Court of Appeals, see *Cunnigham v. Bank*, 4 Am. B. R. 192, 103 Fed. 932.

**Subd. (9). To Preserve Evidence when no Stenographer is Present.**

— This clearly imposes the duty of taking down evidence in long-hand, if a stenographer is not in attendance. As indicated elsewhere,<sup>25</sup> a referee has ample power to secure the attendance and assistance of a stenographer. This subdivision is, therefore, unimportant.

**Subd. (10). To Call for Papers at the Clerk's Office.**— § 51 (3) supplements this subdivision. Even in the same town or city, papers are transmitted by the clerk to the referee by mail.

**II. Subs. b. PROHIBITIONS ON REFEREES.**

**Cannot Act in Cases where Interested.**— The general disqualification of persons who might otherwise be referees is mentioned elsewhere.<sup>26</sup> A referee duly appointed cannot, however, act in all cases. What amounts to disqualification must be determined in each case.<sup>27</sup> Relationship by blood or affinity, even though remote, is usually enough. But, owing a debt to the bankrupt,<sup>28</sup> or, perhaps, being a scheduled creditor of the bankrupt, at least in a no-asset case, does not disqualify. A prior relation of attorney to the debtor, likewise, does not.<sup>29</sup> Pending litigation with the bankrupt, it is thought, will. If disqualified, the referee should immediately file a certificate to that effect, stating the reasons for disqualification, with the clerk; and a reference will then be made to another referee. Disqualification sometimes does not appear until the case is far along, and then only in some single matter. In such cases, that matter may be considered by the judge, on receipt of this certificate, or he may refer it specially to another referee. A referee who acts in a case where he is interested commits an offense under the law, and forfeits his office.<sup>30</sup>

**Cannot Practice in Bankruptcy Proceedings.**— There was a similar prohibition under the law of 1867.<sup>31</sup> The limitation here seems

25. See under Section Thirty-eight.

26. § 35, ante.

27. See learned foot-note of a former editor of this work, in *In re Gardner*, 4 Am. B. R. 420. See form in "Supplementary Forms," post.

28. *Bray v. Cobb*, 1 Am. B. R. 153, 91 Fed. 102.

29. *Carr v. Fife*, 156 U. S. 494.

30. § 29-c (1).

31. § 4. See the same as amended, R. S., § 4996.



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Subs. b.1      Cannot Purchase Property of a Bankrupt Estate.

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to be on practice "in any bankruptcy proceedings." Under the former law, a register could not practice "in or out of court" in any suit or matter pending in his own district or circuit. The difference between the statutes in literal significance is great; in effect, there should be none. The propriety of giving counsel in pending bankruptcy questions, even in another district, may be doubted. General counsel to clients or other attorneys concerning questions not yet in court seems, however, not to be prohibited and may not be thought improper. There are as yet no cases construing this clause. A violation of this prohibition is not an offense.

**Cannot Purchase Property of a Bankrupt Estate.**— This provision is new, and requires no comment. The purchase of the property of a bankrupt estate, either directly or indirectly, by a referee is an offense whereby he forfeits his office and becomes liable to a fine of not to exceed five hundred dollars.<sup>32</sup>

32. § 29-c (2).

## SECTION FORTY.

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### COMPENSATION OF REFEREES..

§ 40. **Compensation of Referees.**— *a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of<sup>1</sup> *fifteen\** dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, *and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration,\** and from estates which have been administered before them one per centum commissions on<sup>2</sup> *all moneys disbursed to creditors by the trustee,\** or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

*b* Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

*c* In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

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**Analogous provisions:** In U. S.: Act of 1867, §§ 4, 5, 10, 47, R. S., §§ 4990, 5008, 5124, 5125; General Order XXX; Act of 1841, §§ 6, 13; Act of 1800, § 47.

In Eng.: § 129.

**Cross references:** To the law: §§ 12; 51 (2) (4); 62; 64-b (3); 72.

To the General Orders: X, XXVI, XXIX, XXXV (2).

To the Forms: None.

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1. Here the word "fifteen" was substituted for the word "ten" by the amendatory act of 1903.

2. Here the words in italics were substituted for the words "sums to be paid as dividends and commissions." by such amendatory act.

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\*Amendments of 1903 in italics.

Subs. a.]      Synopsis of Section; Comparative Legislation.

### SYNOPSIS OF SECTION.

#### I. Subs. a. Compensation of Referees.

Comparative Legislation.

Under the Original Law.

In Pauper Cases.

While Sitting as Special Master.

In Compositions.

Since the Amendatory Act of 1903.

*The Filing Fee.*

*The Claim Fee.*

*Commissions on Disbursements to Creditors.*

*"Full Compensation."*

*Allowance for Expenses.*

#### II. Subs. b, c. When a Case Has Been Referred to Two or More Referees.

In General.

#### I. Subs. a. COMPENSATION OF REFEREES.

**Comparative Legislation.**—In England, the registrars receive salaries, not fees.<sup>3</sup> Under previous laws in this country, the officers corresponding to the present referees have always been paid by fees, fixed sometimes by rules, sometimes by the statute, sometimes by both.<sup>4</sup> The fee bills under the law of 1867 grew so long and proved so onerous that they were largely responsible for the repeal of that law.<sup>5</sup> The difference between the two laws in this respect is marked; precedents will be found of little value. Then compensation depended largely on the number of hearings had and papers drawn; now, besides the fixed filing fee, the compensation of referees is determined by the number of claims proven and the amount of assets administered.

**Under the Original Law.**—Prior to the amendatory act of 1903, the inadequacy of the referee's compensation was conceded. Indeed, this condition was met in some districts by rules that went outside the law and authorized the collection of fees for filing and allowing claims and a *per diem* for hearings, or the like.<sup>6</sup> The amendments

3. Act of 1883, § 129 (1).

4. Consult "Analogous Provisions," ante. See also Owen on Bankruptcy (1842), Appendix, p. 22.

5. Thus, see in the Congressional debates, on the pending bankruptcy bill in February, 1898, lurid phrases like: "the pillage of the fee-fiend,"

and "the rodents who burrow around the places of justice."

6. See *In re Price*, 1 Am. B. R. 419, 91 Fed. 635; *In re Todd*, 6 Am. B. R. 88, 109 Fed. 265. But compare *In re Pierce*, 6 Am. B. R. 747, 111 Fed. 516; *In re Barker*, 7 Am. B. R. 132, 111 Fed. 501. For another means

of 1903 have made this practice no longer possible, whether or not previously excusable; and such rules, where in force, will doubtless be revoked. As the law stood originally, indeed, as it was interpreted and emphasized by General Order XXXV, a referee was entitled to compensation in the following ways and amounts only:<sup>7</sup> (a) a filing fee of \$10 in all cases save those in which a pauper oath accompanied the petition, and (b) one per cent. commissions on all sums paid "as dividends and commissions."<sup>8</sup> The reasons behind these — in our jurisprudence — rather novel ways of compensating federal judicial officers were apparent: the filing fee was intended to cover ordinary services in no-asset cases, the commission on dividends was a *pro-rata* reward dependent, not, as in 1867, on work done, but on the results of that work. The amendments of 1903 are merely an extension of this general policy.

**In Pauper Cases.**—By analogy with the state laws applicable to pauper litigants, the statute permits the indigent bankrupt to secure the services of clerk, referee, and trustee without the payment of the filing fee. This subject and the cases considering it are discussed elsewhere.<sup>9</sup>

**While Sitting as Special Master.**—When an issue exclusively within the province of the judge is referred to the referee as a special master in chancery,<sup>10</sup> the latter does not sit as a referee; and extra compensation in the shape of master fees may, it is thought, even since § 72, added by the amendatory act of 1903, be allowed him.<sup>11</sup> The rate is sometimes fixed by a standing rule of the district court,<sup>12</sup> but, as often by order.

to increase compensation, based doubtless on the practice under the law of 1867, see *In re Dixon*, 8 Am. B. R. 145, 114 Fed. 675.

7. See in particular General Order XXXV (2).

8. The purpose of the law-making power is indicated by the following quotation from the analysis of the bill in its last form:

"Referees will receive a petty filing fee and a small commission on the net amount realized by estates administered before them. This arrangement will interest them in securing

prompt and economical administrations."

9. See Section Fifty-two.

10. See p. 172, ante.

11. *Fellows v. Freudenthal*, 4 Am. B. R. 490, 102 Fed. 731; *In re McDuff*, 4 Am. B. R. 110, 101 Fed. 241; *In re Grossman*, 6 Am. B. R. 510, 111 Fed. 507. See *Bragassa v. St. Louis Cycle*, 5 Am. B. R. 700, 107 Fed. 77. Contra, *In re Troth*, 104 Fed. 291.

12. The rule on this subject, in force in the Northern and Western Districts of New York, is referred to elsewhere, see p. 175, ante, foot-note 54.

Subs. a.]

Since the Amendatory Act.

**In Compositions.**— Here, the referee receives one-half of one per cent. "on the amount to be paid to creditors."<sup>13</sup> This standard of compensation has not been modified by the Act of 1903. Whether "creditors" includes priority claimants is, perhaps, debatable.<sup>14</sup> There are as yet no cases in point.

**Since the Amendatory Act of 1903.**— The changes apply only to cases originating since January, 1903.<sup>15</sup> They have already been indicated. The reasons for them are clear. In brief, (a) the filing fee is increased, (b) commissions are reckoned on all moneys disbursed to creditors, not merely on dividends paid them, and (c) a small fee is allowed out of each estate for the filing and allowing of claims. These different kinds of compensation will be considered separately.

**The Filing Fee.**— This now is \$15, and is paid to the clerk at the time a petition is filed.<sup>16</sup> The clerk pays it to the referee within ten days after the case is closed. The word "closed" has been liberally construed in some districts, and the filing fee has been paid the referee at the end of one or two months, even if the case is not technically at an end.<sup>17</sup>

**The Claim Fee.**— This fee is already familiar in several important districts, where its collection has been authorized by rules. Its origin is doubtless in the commissioner's fee under the law of 1841.<sup>18</sup> That officer's duty was "to take the proof of debts and to take testimony to be used in the circuit or district court," and, for performing the former duty, something similar to the taking of a deposition, he was entitled to \$1. Clearly, however, the referee, to earn this fee now, is not required or expected to draft or supervise the preparation of the proof of debt. The fee is intended merely to cover the extra time required in filing, allowing, and investigating claims.<sup>19</sup>

13. For changes as to the trustee's fee in composition cases, see Section Forty-eight, post.

14. See § 64, generally. Compare "Commissions on Disbursements to Creditors," in this Section, post.

15. See "Supplementary Section to Amendatory Act," post.

16. § 51 (2) (4).

17. See Section Fifty-one, post.

18. See § 6 and § 13 of that act, and consult Owen on Bankruptcy (1842), Appendix, pp. 8, 22.

19. Thus, in the Analysis of the Amendatory Bill (Report No. 1698, 57th Congress, 1st Session, p. 8) it is said:

"The other changes are in the line of increasing efficiency and the securing of the best talent for the important work committed to these officers; thus \* \* \* the fifty-cent filing fee for referees, as probably the fairest way properly to compensate them for the great amount of extra work in hearing contests on claims," etc.

The words "to be paid from the estate, if any, as a part of the cost of administration" are important. Thus, this fee is not chargeable to the creditor who files, and cannot be demanded in advance.<sup>20</sup> Nor is it payable where there are no assets. It is simply one part of "the cost of administration,"<sup>21</sup> and had priority with other disbursements within that phrase. The amount, twenty-five cents, is half the filing fee previously fixed by rule in a few important districts, and but a fourth of that allowed in still others. The Ray bill made the amount fifty cents; but the Senate cut this sum in two. The words "every proof of claim" seem to mean that the fee will be earned even if the proof is on a debt entitled to priority or secured. It is equally clear that the charge is against the whole estate and not on the dividend of each claimant.<sup>22</sup>

*Commissions on Disbursements to Creditors.*—Here there is no change in the rate, which is still one per cent. But the basis of the percentage is now "all moneys disbursed to creditors by the trustee."<sup>23</sup> This means all sums which should be paid through the trustee, notwithstanding an outside agreement between the parties and attorneys; so when property subject to liens is sold by consent of the lienors the referee is entitled to commissions on the purchase price in full.<sup>23a</sup> In the Ray bill the words were "all moneys received and paid out." The change made by the Senate indicates clearly that no commissions are to be paid on moneys disbursed for other purposes than to creditors; conversely the dividend basis being now eliminated such commissions should, it would seem, be paid on all moneys disbursed to secured and priority creditors as well as those not in such classes. The omission of the words "to creditors" in a similar provision of § 48 is significant. At any rate, the numerous

20. The same Report says:

"The collection of this filing fee in advance seems to be permitted by the rules in many districts, though without apparent sanction of law. The suggested amendment ratifies this practice, which has not proven burdensome, while removing the chief objection to it—the requirement that the fee be paid as a condition of filing a claim at all—by requiring that such fee be paid as a cost of administration."

21. See sub nom. "Cost of Admin-

istration" under Section Sixty-four, post.

22. Consult foot-note 20.

23. Consult Section Forty-eight, sub nom. "Since the Amendatory Act of 1903."

23a. In re Sandford Furniture Mfg. Co., 11 Am. B. R. 414, 126 Fed. 888. Under the law, prior to the amendment of 1903 commissions were based upon the sums "to be paid as dividends and commissions." This was held not to include sums paid to satisfy fixed liens on real es-

Subs. b, c.] Expenses; Reference to Two or More Referees.

cases defining the meaning of the word "dividends,"<sup>24</sup> which occurred here in the original law,<sup>25</sup> are no longer valuable.

"*Full Compensation.*"—The significance of these words is apparent. They have been dropped out of § 48.<sup>26</sup> Not so here. They are emphasized by § 72, considered later. A referee in bankruptcy, acting as such, is entitled to no fee, compensation, or emolument for any service performed in that capacity, unless such fee is within the intendment of this section.<sup>27</sup>

*Allowance for Expenses.*—Under General Order XXXV expenses necessarily incurred by referees in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act, when allowed by special order of the judge, are not included in the full compensation allowed to referees under this section. In some jurisdictions this has been held to authorize a charge for office expenses at a specified amount in each proceeding.<sup>27a</sup> Hotel bills and amounts paid stenographers may be allowed as expenses, when a detailed account thereof verified by the oath of the referee that they were necessarily and actually incurred, and showing the amount paid therefor, is returned to the bankruptcy court.<sup>27b</sup>

## II. Subs. b, c. WHEN A CASE HAS BEEN REFERRED TO TWO OR MORE REFEREES.

**In General.**—The statute here needs no elucidation. When (a) a case is transferred from one referee to another, or (b) the order of

tate sold by the trustee, even when sold free and clear of all incumbrances, and when such liens were satisfied from the proceeds of sale. In re Hinckel Brewing Co., 10 Am. B. R. 692, 124 Fed. 702.

<sup>24</sup> In re Sabine, 1 Am. B. R. 322; In re Fort Wayne Corporation, 1 Am. B. R. 706; In re Coffin, 2 Am. B. R. 344; In re Gerson, 2 Am. B. R. 352; In re Fielding, 3 Am. B. R. 135, 96 Fed. 800; In re Barber, 3 Am. B. R. 307, 97 Fed. 547; In re Utt, 5 Am. B. R. 383, 105 Fed. 754; In re Barker, 7 Am. B. R. 132, 111 Fed. 501. See also In re Smith, 5 Am. B. R. 559; In re Mammoth Pine Lumber Co., 8 Am. B. R. 651, 116 Fed. 731.

<sup>25</sup> See foot-notes to text of § 40-a, showing words omitted.

<sup>26</sup> For reason, see Section Forty-eight.

<sup>27</sup> In re Dixon, 8 Am. B. R. 145, 114 Fed. 675, and In re Mammoth Pine Lumber Co., 8 Am. B. R. 651; Dressel v. North State Lumber Co., 9 Am. B. R. 541, 119 Fed. 531.

<sup>27a</sup> In re Tebo, 4 Am. B. R. 235, 101 Fed. 235; In re Carolina Cooperage Co., 3 Am. B. R. 154, 96 Fed. 950. Contra, In re Daniels, 12 Am. B. R. 446, 130 Fed. 596.

<sup>27b</sup> General Order XXVI. In re Daniels, 12 Am. B. R. 446, 130 Fed. 596.

## Reference to Two or More Referees.

[§ 40.]

reference is revoked before the case is concluded, or (c) the proceeding has been specially referred, the judge is required to pro-rate "the fee and commissions." The words of these subsections have not been changed to fit the amendments to subsection a. The court has, however, ample power to pro-rate the new claim fee, without statutory authority, and, in given cases, will doubtless allow each referee twenty-five cents on each claim actually allowed by him.



## SECTION FORTY-ONE.

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### CONTEMPTS BEFORE REFEREES.

§ 41. **Contempts before Referees.**—*a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law. *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

*b* The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of the court.

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**Analogous provisions:** In U. S.: Act of 1867, §§ 4, 5, 7, R. S., §§ 4999, 5002, 5005, 5006; Act of 1800, §§ 14, 15.

**In Eng.:** Act of 1883, § 99 (4); General Rules 70, 85-88.

**Cross references:** To the law: §§ 2 (13) (15) (16); 20; 21; 38 (2).

**To the General Orders:** X, XXII, XXX.

**To the Forms:** Nos. 5, 29, 30.

## SYNOPSIS OF SECTION.

## I. Scope of Section.

## In General.

## II. Subs. a. Contempts before Referees.

## Disobedience.

## Misbehavior.

## Contempts by Witnesses.

*"Subpœnaed."**Refusal to be Sworn or to Testify.*

## III. Subs. b. Practice and Punishment.

## The Certificate of the Referee.

## Practice before the Judge.

## Punishment.

## I. SCOPE OF SECTION.

**In General.**—While the referee is a court of original jurisdiction, he has not the power to commit for contempt.<sup>1</sup> Neither has the registrar in England,<sup>2</sup> nor had the register under the former law.<sup>3</sup> Contempts in bankruptcy are, however, usually committed before the referee. Hence, it seems, this section. Were the law silent as to what are contempts before a referee, the latter is doubtless sufficiently a court<sup>4</sup> to take note of any contempt which might be so held if committed before the court proper. Congress having, however, defined what shall be contempts before referees, no acts or omissions not within the meaning of this section should be certified to the judge as contempts.<sup>5</sup> This restriction is not important. The section is thought to include every possible contempt before a referee. But it should always be remembered that this section does not give bankruptcy courts broader powers to punish for contempt than are possessed by other federal courts.<sup>6</sup>

## II. Subs. a. CONTEMPTS BEFORE REFEREES.

**Disobedience.**—The words of subdivision (1) are general. If it is an order that is disobeyed, it must be a "lawful" order.<sup>7</sup> There

1. See § 41-b.

2. Act of 1883, § 99 (4).

3. § 4, R. S., § 4999; *In re Woodward*, Fed. Cas. 18,000.

4. See §§ 1 (7) and 38 (4). See also *In re Speyer*, Fed. Cas. 13,239.

5. Compare *In re McBryde*, 3 Am.

B. R. 729, 99 Fed. 686; *Ex parte Buskirk*, 72 Fed. 410.

6. *Boyd v. Glucklich*, 8 Am. B. R. 393, 116 Fed. 131.

7. *In re Tudor*, 2 Am. B. R. 808; *In re McCormick*, 3 Am. B. R. 340, 97 Fed. 566.

Subs. a.]

Disobedience.

is no such qualification of the words "writ" and "process;" yet the caution of the courts in asserting this remedy will probably make this omission immaterial. Disobedience may be charged of any one, bankrupt, creditor, or stranger. In most of the reported cases, the bankrupt has been haled to court on an order requiring him to surrender property belonging to his estate, or a person enjoined has disobeyed the injunction. The cases are numerous;<sup>8</sup> each depends on its own facts. There is now no doubt that such referee orders and most injunctions are lawful, or that refusal to obey them is a contempt.<sup>9</sup> Granted that the court or referee has jurisdiction, and the order or mandate is properly served, it follows that only where the person is strictly an adverse claimant,<sup>10</sup> or totally unable to restore,<sup>11</sup> will such person be excused. Unintentional disobedience will even sometimes be a contempt, though it will not usually be punished.<sup>12</sup> The person charged with contempt for failure to comply with an order of the referee should not be punished before he is given an opportunity to prove his inability to do so.<sup>12a</sup> The rule is that property of the bankrupt estate traced to the recent possession or control of the bankrupt is presumed to remain there until he satisfactorily accounts for its disposition or disappearance;<sup>12b</sup> the bankrupt cannot escape an order for the surrender of such property by merely denying upon oath that he has it in his possession or under his control; it is still the duty of the referee and of the court,

8. The following cases have held the acts or omissions charged to amount to a contempt: *In re Tudor*, supra; *In re McCormick*, supra; *In re Friedman*, 2 Am. B. R. 301; *In re Purvine*, 2 Am. B. R. 787, 96 Fed. 192; *In re Schleisinger*, 3 Am. B. R. 342, 97 Fed. 930; *In re Anderson*, 4 Am. B. R. 640, 103 Fed. 854; *In re Deuell*, 4 Am. B. R. 60, 100 Fed. 633; *Ripon Knitting Mills v. Schrieber*, 4 Am. B. R. 299, 101 Fed. 810; *In re Levin*, 6 Am. B. R. 743, 113 Fed. 498. In the following, commitment has been refused: *In re Ogles*, 2 Am. B. R. 514; *In re McBryde*, supra; *In re Mayer*, 3 Am. B. R. 533, 98 Fed. 839; *In re Rosser*, 4 Am. B. R. 153, 101 Fed. 562, reversing s. c., 2 Am. B. R. 746, 96 Fed. 305; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 7 Am. B. R. 421, affirming *Simonson v. Sinsheimer*, 5 Am. B. R. 537,

107 Fed. 898. Consult also, for "contempts," discussion under Section Two, and "stays," that under Section Eleven.

9. *Mueller v. Nugent*, 181 U. S. 1, 7 Am. B. R. 224.

10. *Louisville Trust Co. v. Comingor*, supra. But compare *Mueller v. Nugent*, supra. See also *In re Miller*, 5 Am. B. R. 184, 105 Fed. 57; *In re Oliver*, 2 Am. B. R. 783, 96 Fed. 85.

11. *Simonson v. Sinsheimer*, supra; *In re Chiles*, 22 Wall. 157. Compare, however, *Ripon Knitting Works v. Schrieber*, supra.

12. Thus, see *Atlantic v. Dittmar*, 9 Fed. 316; *Goodyear v. Mullee*, Fed. Cas. 5577; *Morss v. Sewing Machine Co.*, 38 Fed. 482.

12a. *In re Hausman*, 10 Am. B. R. 64, 121 Fed. 984.

12b. *Boyd v. Glucklich*, 8 Am. B. R. 393, 116 Fed. 131.

if satisfied beyond a reasonable doubt that such property is in his possession or under his control, to order him to surrender it to the trustee and to enforce that order by confinement as for contempt.<sup>12c</sup>

**Misbehavior.**— Subdivision (2) clearly refers to any act or omission at a session of the referee court or near its place of sitting, amounting to disrespect or contumacy. No accurate definition of the word "misbehave" is possible.<sup>13</sup> But it must be during a hearing, or, if not, in the presence of the referee, amount to an obstruction of the hearing. This contempt may be committed by any person.

**Contempts by Witnesses.**— Subdivisions (3) and (4) supplement subdivision (1). Subpœnas are writs. Neglect to produce "any pertinent document" in response to a subpœna is a contempt.<sup>14</sup> Refusal to appear after being subpœnaed is equally so.<sup>15</sup> The emphasis laid on "pertinent" should be noted. "Refuse" here probably includes "neglect." The restriction stated in the proviso clause is important. A referee's subpœna is really the district court's in effect, and, therefore, reaches as far as one issued in a case pending in such court. So, it is thought, of a mere order to appear, even if issued by the referee. Such a subpœna or order may be effective outside the judicial district, if the residence of the witness is not more than one hundred miles away,<sup>16</sup> provided the district is in the same State; unless the party summoned is the bankrupt. The latter may be ordered to appear if his residence, whether in the district or the State, is no more than one hundred and fifty miles away.<sup>17</sup>

"*Subpœnaed.*"— The connection between this word and the last clause of subsection a seems close. A witness who refuses to appear may excuse himself in commitment proceedings if his lawful mileage and fee for one day's attendance was not paid or tendered him.<sup>18</sup>

12c. In re Shachter, 9 Am. B. R. 499, 119 Fed. 1010; Boyd v. Glucklich, 8 Am. B. R. 393, 116 Fed. 131; In re Greenberg, 5 Am. B. R. 840, 106 Fed. 496; In re Schlesinger, 4 Am. B. R. 361, 42 C. C. A. 207, 110 Fed. 117; In re Deuell, 4 Am. B. R. 60, 100 Fed. 633; In re Mayer, 3 Am. B. R. 533, 98 Fed. 839; In re McCormick, 3 Am. B. R. 340, 97 Fed. 566.

13. Consult Blight v. Fisher, Fed. Cas. 1,542; U. S. v. Carter, Fed. Cas. 14,740; Sharon v. Hill, 24 Fed. 726.

14. In re Howard, 2 Am. B. R. 582, 95 Fed. 415; In re Fixen, 2 Am. B. R. 822, 96 Fed. 748.

15. In re Ellerbe, 13 Fed. 530; In re Spofford, 62 Fed. 443.

16. See R. S., § 876. Consult In re Hemstreet, 8 Am. B. R. 760, 117 Fed. 568.

17. Compare under Section Seven.

18. For the mileage and fee, see R. S., §§ 848, 849, and, if in certain of the western States, Act of August 3, 1892.

*Refusal to be Sworn or to Testify.*—This is as much a contempt as refusal to appear. The reported cases usually turn on whether the witness was entitled to his privilege. This subject is discussed elsewhere.<sup>19</sup>

### III. Subs. b. PRACTICE AND PUNISHMENT.

**The Certificate of the Referee.**—The judge alone can punish for a contempt committed before the referee. He is notified of the contempt by a certificate,<sup>20</sup> signed and usually prepared by the referee. This certificate must give "the facts" and show the commission of one of the contempts enumerated in subdivision a. But, where it appears that the alleged contemnor had no notice of the order, refusal to obey which is the contempt alleged, he will not be committed.<sup>21</sup> The certificate should be filed with the clerk of the court.

**Practice before the Judge.**—On the filing of the referee's certificate, the matter is customarily brought up on petition and order. If by petition, the facts stated should bring it clearly within subdivision a,<sup>22</sup> and the order should be in the nature of a show cause. A copy of the petition should be served with the order. Attachment may also be asked, and, in exceptional cases, granted.<sup>23</sup> On the return of the order or appearance of the alleged contemnor, the judge must "in a summary manner, hear the evidence of the acts complained of," and punish or refuse to punish in the same manner as if the contempt had been committed before him. While the cases are not uniform, the better opinion is that the hearing is not a review, and, therefore, the referee's rulings on the facts may be disturbed, even if not palpably erroneous.<sup>24</sup> Formerly, it was held that the respondent's answer must be taken as true.<sup>25</sup> This, however, seems not now the law.<sup>26</sup> The issue raised by the response or answering affidavits may be referred to a referee as special master;<sup>27</sup> but not, it is thought, to the referee before whom the contempt was committed.

19. See Section Seven.

20. In re Miller, 5 Am. B. R. 184, 105 Fed. 57; In re Salkey, Fed. Cas. 12,254; In re Graves, 29 Fed. 60.

21. In re Rosser, 4 Am. B. R. 153, 101 Fed. 562.

22. Creditors v. Cozzins, Fed. Cas. 3,378; U. S. v. Berry, 24 Fed. 780; In re Swan, 150 U. S. 637.

23. In re Phelan, 62 Fed. 817.

24. In re Mayer, 3 Am. B. R. 533, 98 Fed. 839. See also In re Tudor, 2 Am. B. R. 808.

25. See the minority opinion of Judge Shelby in In re Purvine, 2 Am. B. R. 787, 96 Fed. 192. And see In re May, 1 Fed. 737.

26. In re Pitman, Fed. Cas. 11,184.

27. In re McCormick, 3 Am. B. R. 340, 97 Fed. 566; In re Speyer, Fed. Cas. 13,239.

**Punishment.**— If found guilty, the contemnor may be fined or imprisoned, or both; but not punished in any other way.<sup>28</sup> There seems to be no limit on the time of imprisonment. Usually the order provides that he stand committed until he performs the act for failure of which he is declared to be in contempt. A commitment of this kind has been held not a violation of the constitutional prohibition against imprisonment for debt.<sup>29</sup> The practice after the filing of the certificate conforms to that in the federal courts and the numerous precedents and text-books may be consulted with profit.<sup>30</sup> The remedy of the contemnor after commitment is *habeas corpus*,<sup>31</sup> but, it seems, if the proceeding was criminal in its nature, the court cannot discharge him from custody.<sup>32</sup>

28. § 2 (13).

29. In re Anderson, 4 Am. B. R. 640, 103 Fed. 854; Ripon Knitting Mills v. Schrieber, 4 Am. B. R. 299, 101 Fed. 810. Compare Bogart v. Supply Co., 27 Fed. 722.

30. Compare under Section Two.

31. Compare In re Houston, 2 Am. B. R. 107, 94 Fed. 119.

32. In re Miller, 5 Am. B. R. 184, 105 Fed. 57.

## SECTION FORTY-TWO.

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### RECORDS OF REFEREES.

§ 42. **Records of Referees.**— *a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in Circuit Courts of the United States.

*b* A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

*c* The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

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**Analogous provisions:** In U. S.: Act of 1867, § 4, R. S., § 5000.

In Eng.: None.

**Cross references:** To the law: §§ 21-d; 39 (5) (7).

To the General Orders: II, XX, XXII, XXIII.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Records of Referees.

Subs. a. How Kept.

Subs. b. What Are.

Subs. c. When and How Certified to the Clerk.

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#### I. RECORDS OF REFEREES.

**Subs. a. How Kept.**— This section should be read in connection with § 39 (5) (7). The records should conform in general to the records of equity cases in the circuit courts. The former law required that a short memorandum be made of the proceedings, and a copy of it sent each day to the clerk.<sup>1</sup> This is not required now.

1. § 4, R. S., § 5000.

By analogy, however, some referees make typewritten memoranda of meetings or orders on separate sheets of paper, filing them in a temporary cover from time to time and binding the whole into a book at the end of the case.<sup>2</sup> No papers are actually recorded;<sup>3</sup> and formal orders are not inserted in the record books. They should be drawn and filed by the attorneys in charge. After reference, all papers should be filed with the referee,<sup>4</sup> and he should indorse them with "the day and hour of filing and a brief statement" of their character.<sup>5</sup>

**Subs. b. What Are.**—The record of a case consists of the referee's record book and "the papers on file;" all testimony taken should form a part of the record book. Some referees have adopted a record wrapper into which are bound the sheets constituting the record book, the whole, at the conclusion of the case, wrapped about the papers that have been filed, thus making a compact bundle. Others make up what may be called a roll of the proceeding. The records constitute the case and when, through copies, introduced in evidence in other courts are *prima facie* proof of the facts stated therein.<sup>6</sup>

**Subs. c. When and How Certified to the Clerk.**—When the case is concluded before the referee, his records must be certified to by him and transmitted to the clerk. This means when the case is administered; whether the bankrupt has his discharge or not is not material. It is thought, too, that when a trustee is appointed but fails to qualify, or qualifies, and files a report of no assets but does not ask for a final meeting, the case, after a sufficient lapse of time,—as, for instance, when no claims have been filed and a year elapsed<sup>7</sup>—will be deemed "concluded." The records should be accompanied by a brief certificate by the referee to the effect that the case is closed and that the papers handed up constitute his records.<sup>8</sup> It is often attached to or forms the filing cover of the record book. When thus filed, the referee's records become a part of those of the district court itself. From that time, the referee ceases to have jurisdiction of the case

2. For an elaborate and satisfying system of records, see that suggested in 1 N. B. N. 459-461.

3. Compare R. S., § 4992.

4. General Order XX.

5. General Order II.

6. § 21-d. Compare Act of 1867, § 38; In re Spencer, Fed. Cas. 13,229; In re Crane, Fed. Cas. 3,352.

7. See § 57-n.

8. For a form, see 1 N. B. N. 120, Form N.



## SECTION FORTY-THREE.

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### REFEREE'S ABSENCE OR DISABILITY.

§ 43. **Referee's Absence or Disability.**— *a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

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**Analogous provisions:** In U. S.: Act of 1867, § 5, R. S., § 5007.

In Eng.: None.

**Cross references:** To the law: §§ 22; 34 (1); 40.

To the General Orders: VI.

To the Forms: None.

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### I. REFEREE'S ABSENCE OR DISABILITY.

**In General.**— This section supplements § 34 (1), and confers jurisdiction on the judge to appoint a new referee when the referee of a specified jurisdiction is absent or disqualified or the office is vacant. In any of such cases, (1) the judge may act, or he may (2) appoint another referee or (3) he may designate a referee of the same judicial district to fill the vacancy. The section is often availed of when a referee is disqualified<sup>1</sup> in a specified case. It could, it is thought, be used where a referee suffered from a prolonged illness or became insane, he being then "absent" from his duties as much as if out of the country. If not, the judge could remove him under the authority given by § 34. The power to transfer cases from one referee to another,<sup>2</sup> and the pro-rating of fees<sup>3</sup> in that event, are considered elsewhere. This section seems to imply that, subject to the exception in § 22-b, all cases arising in a referee district must in the first instance be referred to that referee.<sup>4</sup>

1. See under Section Thirty-nine of this work.

2. § 22-b.

3. § 40-b.

4. Compare § 22-a.

## SECTION FORTY-FOUR.

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### APPOINTMENT OF TRUSTEES.

§ 44. **Appointment of Trustees.**—*a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

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**Analogous provisions:** In U. S.: Act of 1867, §§ 13, 18, R. S., §§ 5034, 5036, 5038, 5039, 5040, 5041, 5042; Act of 1841, § 3; Act of 1800, §§ 6, 7.

In Eng.: Act of 1883, §§ 21, 84; *as to official receiver being trustee*, §§ 54 (1); 121.

**Cross references:** To the law: §§ 1 (26); 2 (17); 45; 46; 50-b-c-k; 56; 57; 63.

To the General Orders: XIII, XIV, XV, XVI, XVII, XXV.

To the Forms: Nos. 22, 23, 24, 25, 26, 27, 52, 53, 54, 55.

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### SYNOPSIS OF SECTION.

#### I. History and Comparative Legislation.

Scope of Section.

Comparative Legislation.

*In the United States.*

#### II. Appointment of Trustees.

In General.

At First Meetings.

*Where no Agreement.*

*Necessity of Approval.*

After Vacancies.

How many Trustees.

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 § 44.] Scope of Section; Comparative Legislation.
 

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**II. Appointment of Trustees — Continued.**

When no Trustee.

Notification, Bond, Qualification, etc.

**III. Removal of Trustees.**

For Cause.

By Resignation.

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 I. HISTORY AND COMPARATIVE LEGISLATION.

**Scope of Section.**— This section should be read with § 63, on what are provable debts, § 1 (9), on who are creditors and their agents, proxies, etc., § 56, on who may vote and what constitutes a voting majority at creditors' meetings, and § 45, on the qualifications of trustees. None of the matters belonging to those subjects are discussed here. This section has to do only with the kindred topics indicated in the Synopsis, *supra*.

**Comparative Legislation.**— One of the storm centers of bankruptcy legislation has been the method of appointing the officers of administration.<sup>1</sup> The English system has see-sawed from administration by the court through commissioners of its own appointment,<sup>2</sup> to that by trustees chosen by the creditors. The present system<sup>3</sup> is midway between the two, the official receiver, who is an officer of the Board of Trade, taking charge of the estate until the creditors can choose; and even then the Board of Trade may certify objections to their choice to the High Court, which the latter may hold sufficient. If no appointment is made by the creditors within four weeks, the Board of Trade may itself appoint a trustee, subject to the creditors' right subsequently to appoint some one in his stead. This is, in effect, appointment by the creditors, with a qualified veto by the Board of Trade. The corresponding officer under the French system is the syndic. As in England, a temporary official syndic is appointed, and the creditors may then advise the court as to their wishes. But their advice is not binding. The result is, as has been said, that the syndic "is generally a person enjoying the confidence of the court who has made the settlement

1. For the different methods of appointment in Europe, see "Bankruptcy; a Study in Comparative Legislation," by Dunscomb, vol. II, No. 2, Columbia College Studies in History, etc.  
 2. Thus, from 1831 to 1869.  
 3. Act of 1883, § 21.

of bankruptcy estates his special profession." This method seems to pertain in most of the continental countries.<sup>4</sup>

*In the United States.*—The history of bankruptcy legislation in this country reveals the same changes. Our administrators have been called, successively, either assignees or trustees. Not until our law of 1867 was the principle that insolvent estates are really trusts and the creditors, as beneficiaries, entitled to choose the trustees, recognized by our law.<sup>5</sup> Even under that law, the recognition was somewhat half-hearted.<sup>6</sup> The choice in the first instance, though by the creditors as now, was subject to the approval of the judge; and yet, in case an assignee failed to qualify or the office became vacant, the judge or register might ignore the creditors and "fill the vacancy." The judge could "for any cause needful or expedient" either appoint additional assignees or order a new election. We have never adopted the asset-saving device of a temporary official trustee,<sup>7</sup> but continue to limp along with, when "absolutely necessary for the preservation of estates,"<sup>8</sup> a court-chosen receiver.

## II. APPOINTMENT OF TRUSTEES.

**In General.**—The present law goes further than any bankruptcy statute either here or elsewhere in giving creditors the right to choose the trustees. The section under discussion declares: "The creditors shall \* \* \* appoint one trustee or three trustees." There is nothing here giving the judge or referee the right to approve or disapprove. Nor is there anything in § 2 (17) conferring on them such a power; though some have thought it is inherent in the court under the last sentence of § 2. Trustees in bankruptcy are creatures of the statute. Viewed as Congress left it, therefore, the law of 1898 vests in the creditors an unqualified right to appoint their own trustees.<sup>9</sup> Indeed, § 44, which declares they "shall appoint," under familiar canons of construction, must be taken as controlling on the earlier and more general words of § 2 (17), giving courts of bankruptcy power to "appoint trustees," pursuant to the recommendations of creditors.

4. See Mr. Dunscomb's admirable monograph, referred to above.

5. There was even an official assignee appointed by the court, under the law of 1841.

6. Thus, see § 13, R. S., § 5034.

7. Eng. Act of 1883, § 66.

8. Compare § 2 (3).

9. *In re Lewensohn*, 3 Am. B. R. 299, 98 Fed. 576.

§ 44.]

At First Meetings; Where no Agreement.

**At First Meetings.**— Both the statute and the forms indicate that the creditors must appoint a trustee or trustees “at their first meeting.”<sup>10</sup> This means the meeting called under the notice known as Form No. 18. It includes any regular continuance of such meeting, a practice often resorted to.<sup>10a</sup> The method of voting, and the power of proxies to vote is considered elsewhere.<sup>11</sup> Form No. 23 should be used when the referee appoints; Form No. 22 may be used when the creditors do the same. If, however, there is no contest among them, a simple order similar to Form No. 23, declaring such fact and that the creditors present appointed the trustee named and that the referee approved their choice, is suggested as time-saving and proper.<sup>12</sup>

*Where no Agreement.*— Only in case a majority in number and amount<sup>13</sup> do not appoint can the judge or the referee appoint. On this proposition there is already considerable law.<sup>14</sup> But, when the creditors “neglect to recommend the appointment” of a trustee, the judge or referee may do so.<sup>15</sup> This power corresponds to that in the English law, and is given to prevent deadlocks. If at the first meeting all claims offered for proof are in dispute, and it is impracticable at that time to settle the dispute, it appears to be within the discretion of the referee to appoint a trustee.<sup>15a</sup> Where there is a sharp conflict or a close vote, resulting in a majority in amount one way and in number the other, the choice of one not a candidate and, if possible, who has had experience in the manage-

10. See *In re Jones*, Fed. Cas. 7,447; *In re Lake Superior*, etc., Fed. Cas. 7,997.

10a. *In re Nice*, 10 Am. B. R. 639, 123 Fed. 987, in which case it was expressly held that the first meeting of creditors may be continued by proper and reasonable adjournments so as to give the creditors every reasonable opportunity to exercise the power conferred upon them to choose a trustee; so where a majority of the creditors both in number and amount ask for a reasonable postponement in order that the differences existing among the creditors may be disposed of, their request should be granted.

11. See under Section Fifty-six.

12. A form will be found in “Supplementary Forms,” post.

13. See Section Fifty-six. Where the bankrupt's former attorney had a majority in number of the creditors, while his opponent had a majority in amount, and no request was made for a second ballot, the referee may appoint the trustee. *In re Machin*, 11 Am. B. R. 449, 128 Fed. 315.

14. *In re Lewensohn*, ante; *In re Brooks*, 4 Am. B. R. 50, 100 Fed. 432; *In re Richards*, 4 Am. B. R. 631, 103 Fed. 849. See also *In re Henschel*, 6 Am. B. R. 305, 109 Fed. 861, as reversed in s. c., 7 Am. B. R. 662, 113 Fed. 443. Compare, under former law, *In re Pearson*, Fed. Cas. 10,878.

15. *In re Kuffler*, 3 Am. B. R. 162, 97 Fed. 187.

15a. *Matter of Cohen*, 11 Am. B. R. 439.

ment of estates, is thought the part of wisdom. But there can be under the present law no official or general trustee,<sup>16</sup> as seems to have been the practice under the law of 1841.<sup>17</sup>

*Necessity of Approval.*—General Order XIII seeks to graft on the law a provision of the statute of 1867,<sup>18</sup> to the effect that the appointment of the trustee is “subject to be approved or disapproved by the referee or by the judge.” The courts have quite generally recognized this rule<sup>19</sup> as a quasi-judicial interpretation of the statute by the Supreme Court. In view of the plain words of the law, discussed in a previous paragraph,<sup>20</sup> it may be doubted whether this General Order will stand the scrutiny of the court that promulgated it, provided the question should be brought up in a case involving substantial rights. Meanwhile, judges and referees, being bound by the General Order, will doubtless continue to exercise the power to approve or disapprove. It is thought that these officers, in the event of an ultimate decision denying them this jurisdiction, have ample power to prevent the appointment of incompetent or improper trustees by the discretion given them to determine who are creditors,<sup>21</sup> coupled with their power to continue meetings and notify and bring in absent claimants. But if the choice of the creditors is disapproved, neither the judge nor the referee can appoint; another meeting or vote should be ordered.<sup>22</sup> A referee cannot ignore the appointment of a trustee by creditors and proceed summarily to appoint without holding another election. If he disapprove of the appointment it is his duty to make an order in writing to that effect, and the parties interested may apply to a district judge, who may remove the trustee appointed by the creditors and order another appointment by them.<sup>22a</sup>

**After Vacancies.**—Here again the policy of the law is different from its predecessor. Immediately a vacancy occurs either (1) in the office of trustee, or (2) after an estate has been reopened, or

16. General Order XIV.

17. Compare Rule 51, Southern District of New York, under Act of 1841, Owen on Bankruptcy, Appendix, p. 11.

18. § 13, R. S., § 5034.

19. In re Lewensohn, ante; In re Rekersdres, 5 Am. B. R. 811, 108 Fed. 206; Falter v. Reinhard, 4 Am. B. R.

782, 104 Fed. 292. On review in C. C. A., In re McGill, 5 Am. B. R. 155, 106 Fed. 57.

20. See p. 354, ante.

21. See §§ 56, 57, and 63; General Order XXI.

22. In re Mackellar, 8 Am. B. R. 669, 116 Fed. 547.

22a. In re Hare, 9 Am. B. R. 520, 119 Fed. 246.

(3) a composition has been set aside, or (4) a discharge has been revoked, or (5) "if there is a vacancy in the office of trustee," the creditors must be summoned in the usual way; and they appoint the trustee.<sup>23</sup> The value of the words just quoted, unless they refer to a case where at the first meeting no trustee was appointed,<sup>24</sup> does not seem clear. The purport of the clauses on vacancies is, however, beyond the domain of discussion. All vacancies must be filled as if at a first meeting. It is thought, however, that, when a trustee duly appointed fails to qualify or dies before he can do so, on motion or consent of all the creditors who voted at the meeting when he was chosen, they may appoint a substitute trustee, without calling another meeting for that purpose.<sup>25</sup> Where an estate is reopened the office of trustee is vacant and the court cannot appoint unless the creditors have failed to do so;<sup>25a</sup> but the appointment of a trustee being vested in the court upon certain conditions, a failure to comply with such conditions does not deprive the court of its jurisdiction, and the validity of the appointment of a trustee after an estate is reopened cannot be attacked in a collateral action.<sup>25b</sup>

**How many Trustees.**—Under the former law, the creditors chose "one or more assignees."<sup>26</sup> Now, there can be but one or three trustees. Votes for two trustees should, therefore, be refused. It seems also that, where one of three trustees dies, a meeting should be called to fill the vacancy.<sup>27</sup> At such a meeting, the creditors may of course vote to continue the survivor alone, or elect him as a single trustee.

**When no Trustee.**—By General Order XV, in no-asset cases, provided there are no appearances by or for creditors, the judge or referee may "direct that no trustee be appointed." This practice is new; it is a boon to bankrupts and referees. Its validity may, however, be doubted.<sup>28</sup> If the creditors do not appoint, "the court shall do so." If there is no trustee, the difficulty of setting

23. See General Order XXV, and compare *In re Lewensohn*, ante. 871; *Lamphrey v. Nudd*, 29 N. H. 299.

24. See General Order XV.

25. *In re Wright*, 2 Am. B. R. 497.

25a. *In re Newton*, 107 Fed. 429, 46 C. C. A. 399.

25b. *Fowler v. Jenks*, 11 Am. B. R. 255 (Minn. Sup. Ct.); *Harvey v.*

*Tyler*, 2 Wall. (U. S.) 342, 17 L. Ed. 871; *Lamphrey v. Nudd*, 29 N. H. 299.

26. § 13, R. S., § 5034.

27. See last paragraph. Compare *In re Scheiffer*, Fed. Cas. 12,445.

28. Thus, see, under the former law, *In re Cogswell*, Fed. Cas. 2,959; *In re Graves*, Fed. Cas. 5,709.

off exempt property is apparent.<sup>29</sup> Efforts have been made to overcome this difficulty by local rules,<sup>30</sup> but their validity is also doubtful. If no trustee is appointed at such a first meeting a trustee may still be appointed later, "if the court shall deem it desirable."<sup>30a</sup> In cases covered by this General Order, further meetings may by order be dispensed with. Form No. 27 should be used, with such additions<sup>31</sup> as to the setting apart of exemptions as the court feels it has power to grant.

**Notification, Bond, Qualification, etc.**—The referee must immediately notify the trustee of his appointment.<sup>32</sup> Form No. 24 indicates the method. The notice is, however, often given orally, and should be, if the trustee-elect is present at the meeting. The trustee should notify the referee of his acceptance or declination. He rarely does. The presentation of the bond, or a failure to present within the required time is thought sufficient. The requirements as to trustees' bonds<sup>33</sup> and duties<sup>34</sup> are discussed elsewhere.

### III. REMOVAL OF TRUSTEES.

**For Cause.**—The creditors have, however, no control over the removal of trustees, other than to initiate proceedings to that end. The former law<sup>35</sup> gave them such control "with consent of the court." Now, the court is given sole power to remove,<sup>36</sup> but this must be done by the judge, not the referee.<sup>37</sup> The district rules which confer on the referees jurisdiction to perform all the functions of the judge usually except such powers as have been withdrawn from them by the General Orders. Numerous cases on the removal of trustees under the former law will be found in point.<sup>38</sup> The practice on removals is suggested by Forms Nos. 52, 53, 54, and 55. Removal is a matter of discretion and is, therefore, not

29. This must be done by a trustee, § 47-a (11). Exempt property does not pass directly to the claimant. See under Section Six.

30. Thus, see rule in jurisdiction of Referee Hotchkiss (Erie Co. N. Y.), 1 N. B. N. 115.

30a. *Clark v. Pidcock*, 12 Am. B. R. 309 (C. C. A.), 129 Fed. 745.

31. See also "Supplementary Forms," post.

32. General Order XVI.

33. See under Section Fifty of this work.

34. See Section Forty-seven.

35. § 18, R. S., § 5039.

36. § 2 (17).

37. General Order XIII.

38. *In re Sacchi*, 43 How. Pr. (N. Y.) 250; *In re Mallory*, Fed. Cas. 8,990; *Ex parte Perkins*, Fed. Cas. 10,982; *In re Blodgett*, Fed. Cas. 1,552; *In re Price*, Fed. Cas. 11,409; *In re Perry*, Fed. Cas. 10,998; *In re Grant*, Fed. Cas. 5,692.



reviewable;<sup>39</sup> but, being a judicial discretion, should be exercised only when there is sufficient cause.<sup>40</sup>

**By Resignation.**— The statute does not, as did its predecessor,<sup>41</sup> provide for such a contingency. A trustee can unquestionably resign, but, it is thought, his resignation is still ineffectual, save “with the consent of the judge” or referee.

<sup>39</sup>. In re Dewey, Fed. Cas. 3,849;  
In re Adler, Fed. Cas. 82.

<sup>40</sup>. In re Mallory, Fed. Cas. 8,990.  
<sup>41</sup>. § 18, R. S., § 5038.

## SECTION FORTY-FIVE.

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### QUALIFICATIONS OF TRUSTEES.

§ 45. **Qualifications of Trustees.**— *a* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

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**Analogous provisions:** In U. S.: Act of 1867, § 18, R. S., § 5035.

In Eng.: Act of 1883, § 21 (1) (2).

**Cross references:** To the law: §§ 44; 55-b; 56.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Qualifications of Trustees.

In General.

Statutory Qualifications.

Disqualifications.

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#### I. QUALIFICATIONS OF TRUSTEES.

**In General.**— The only statutory disqualification under the former law seems to have been that the proposed trustee had received a preference. At the same time, the action of the creditors being subject to the approval of the judge, many disqualifications were in effect recognized by the courts. Since only those qualified may be appointed, votes should not be received for any nominees not clearly within the terms of this section. When the objection is that the proposed trustee is not competent<sup>1</sup> to perform the duties of the office, however, votes should be received, and, if they result in his appointment, his ability to perform such duties should be investigated before he is allowed to qualify.

1. Compare, under former law, § 18, R. S., § 5035.

**Statutory Qualifications.**— Trustees may be either individuals or corporations. In either case, they must have offices within the judicial district. Under the former law, it was held that they must reside in such district.<sup>2</sup> To “have an office” is thought to mean the use or occupancy of an office for the transaction of business,<sup>3</sup> perhaps even one in charge of a partner or clerk. This restriction seems to make it necessary to appoint a different trustee in an ancillary proceeding in another district.<sup>4</sup> If a corporation is chosen, only those authorized by charter or by law “to act in such capacity” can be appointed trustee. This manifestly applies to trust companies and other corporations which are permitted by law to do a trustee business. There are as yet no cases construing the affirmative qualifications stated in this section.

**Disqualifications.**— So long as General Order XIII continues in force,<sup>5</sup> certain disqualifications, based on precedent and common sense, rather than the statute, will also be recognized by the courts. Thus, under the present law, it is thought, one who is palpably the bankrupt’s choice will be held disqualified, or, more correctly, his appointment will not be approved;<sup>6</sup> but mere hostile animus against the bankrupt is not enough,<sup>7</sup> nor that he has business relations with the referee,<sup>8</sup> though this doctrine may be questioned. A stockholder of a bankrupt corporation who had been intimately associated as legal adviser with those formerly in control will be deemed disqualified and his appointment should be set aside.<sup>8a</sup> But the fact that the proposed trustee is a stockholder in a corporation appearing as a creditor is not a disqualification.<sup>8b</sup> It has also been held that the fact that the trustee advised an assignment for the benefit of creditors, constituting the act of bankruptcy complained of, and was himself the assignee, does not disqualify him from acting as trustee.<sup>8c</sup> Under the former law, that the assignee-elect was the

2. In re Havens, Fed. Cas. 6,231; In re Loder, Fed. Cas. 8,459.

3. In re Loder, ante.

4. Compare In re Boston H. & E. R. R. Co., Fed. Cas. 1,678.

5. See pp. 355, 356, ante.

6. Falter v. Rheinhard, 4 Am. B. R. 782, 104 Fed. 292. On review in C. C. A., In re McGill, 5 Am. B. R. 155, 106 Fed. 57.

7. In re Lewensohn, 3 Am. B. R. 299, 98 Fed. 576.

8. In re Brown, 2 N. B. N. Rep. 590.

8a. In re Gordon, etc., Co., 12 Am. B. R. 94, 129 Fed. 622.

8b. In re Lazoris, 120 Fed. 716.

8c. In re Blue Ridge Packing Co., 11 Am. B. R. 36, 125 Fed. 619.

bankrupt's choice warranted a refusal to confirm;<sup>9</sup> so also where the candidate made it a regular business to solicit creditors' votes,<sup>10</sup> or was a near relative,<sup>11</sup> or a bookkeeper of one of the bankrupts,<sup>12</sup> or had a direct adverse interest to the creditors,<sup>13</sup> or where the choice was secured by an agreement to pay certain voting creditors in full. But, it seems, a general creditor was eligible,<sup>14</sup> and that the bankrupt's attorney was not positively disqualified, if he at once severed his relations as such.<sup>15</sup>

9. In re Bliss, Fed. Cas. 1,543; In re Wetmore, Fed. Cas. 17,466.

10. In re Doe, Fed. Cas. 3,957; In re Smith, Fed. Cas. 12,971; In re Haas, Fed. Cas. 5,884.

11. In re Bogert, Fed. Cas. 1,600; In re Zinn, Fed. Cas. 18,216.

12. In re Powell, Fed. Cas. 11,354.

13. In re Clairmont, Fed. Cas. 2,781.

14. Id.

15. In re Barrett, Fed. Cas. 1,043; In re Lawson, Fed. Cas. 8,150; In re Clairmont, Fed. Cas. 2,781. See also cases cited In re Rung, 2 Am. B. R. 620. The uninfluenced votes of creditors in favor of one for trustee who had formerly been the attorney for the bankrupt are not a nullity so that the opposing candidate for trustee must be declared elected. In re Machin, 11 Am. B. R. 449, 128 Fed. 315.

## SECTION FORTY-SIX.

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### DEATH OR REMOVAL OF TRUSTEES.

§ 46. **Death or Removal of Trustees.**— *a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

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**Analogous provisions:** In U. S.: Act of 1867, §§ 13, 14, 16, 18, R. S., §§ 5036, 5039, 5042, 5048.

**In Eng.:** None.

**Cross references:** To the law: §§ 8; 23; 44; 47.

**To the General Orders:** None.

**To the Forms:** None.

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### I. ACTIONS DO NOT ABATE.

**On Death or Removal of Trustee.**— This is but a re-enactment of provisions found in the former law.<sup>1</sup> Prior to that law, it had been held that such cause of action vested in his personal representatives;<sup>2</sup> also that, if the assignee was defendant, the right of action abated.<sup>3</sup> It was to meet these rulings that the section was inserted in the present law. It applies to all suits or proceedings, and as well if the trustee is a defendant as if a plaintiff. It applies also no matter how the trustee's removal is brought about, though it is a question whether it would if he resigned. In that case, the court could doubtless order a resigning trustee to continue such a suit. Removals of trustees are discussed elsewhere;<sup>4</sup> likewise the effect of the death of one of three trustees.<sup>5</sup>

1. § 16, R. S., § 5048.

2. *Richards v. Maryland Ins. Co.*,  
8 Cranch, 84.

3. *Hall v. Cushing*, 8 Mass. 521.

4. See under Section Forty-four.

5. *Id.*; also § 47-b.

## SECTION FORTY-SEVEN.

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### DUTIES OF TRUSTEES.

§ 47. **Duties of Trustees.**— *a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estate; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

*b* Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

*c* The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the

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§ 47.1      Analogous Provisions; Synopsis of Section.

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*fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.\**

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**Analogous provisions: In U. S.:** *As to deposits of money, Act of 1867, § 17, R. S., § 5059; Act of 1841, § 9; Act of 1800, § 54; As to accounting for interest, R. S., § 5062B; As to submission of accounts, Act of 1867, § 28, R. S., § 5062B; As to setting apart exemptions, Act of 1867, General Order XIX; Also generally to many sections, prescribing other duties.*

**In Eng.:** Generally to different sections prescribing duties.

**Cross references: To the law:** §§ 1 (26); 2 (7) (8) (11); 6; 11-b-c-d; 21-e; 23-a-b; 26; 27; 29-a; 38 (5); 39-a (1); 49; 55-f; 57-i-m; 60-d; 61; 62; 64; 65; 66; 67; 68; 70.

**To the General Orders:** XVII, XVIII, XXI, XXVIII.

**To the Forms:** Nos. 40-51.

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## SYNOPSIS OF SECTION.

### I. Scope of Section.

In General.

### II. Subs. a (1) (2) (3). Collection of Assets.

In General.

Suits by Trustees.

Property Vested in Trustees.

Sales by Trustees.

Employment of Attorneys.

Rapidity in Administration.

Accounting for Interest.

Deposits.

### III. Subs. a (6) (7) (8) (10). Accounts and Reports.

In General.

Practice.

### IV. Subs. a (4) (9). Distribution.

Expenses of Administration.

Payment of Priorities.

Dividends.

Method of Payment.

Trustee's Supplemental Report.

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\*Amendment of 1903 in italics.

**V. Subs. (5) (11). Miscellaneous Duties.**

Setting Apart Exemptions.

Furnishing Information.

In General.

**VI. Subs. b. Concurrence of Two of Three Trustees Necessary.**  
In General.**VII. Subs. c. Trustee to Record Certified Copy of Adjudication.**  
Amendment of 1903.

## I. SCOPE OF SECTION.

**In General.**—The duties of the trustee here enumerated are summarized in the “Synopsis,” *ante*. The section is, however, not exclusive. Other duties are put on the trustee in many sections scattered through the law.<sup>1</sup> Further, additional duties are prescribed in General Order XVII. Besides, the judge or referee, or the creditors by resolution, may direct still other things to be done by the trustee, provided they are within the customary functions of such officers. While the trustee is technically at all times under the direction of the court, he should be ready to act upon his own responsibility and intelligence in the administration of the estate, resorting to the court for advice and instructions where matters of a complicated nature and of great importance have arisen.<sup>1a</sup>

## II. Subs. a (1) (2) (3). COLLECTION OF ASSETS.

**In General.**—This is a trustee’s first duty. Vested with the title of the bankrupt,<sup>2</sup> he is also the representative of the creditors.<sup>3</sup> He is, further, a quasi officer of the court.<sup>4</sup> He must proceed to “collect and reduce to money the property \* \* \* under the direction of the court, and close up the estate as expeditiously as is com-

1. See “Cross-References,” *ante*.

1a. In re Baber, 9 Am. B. R. 406, 119 Fed. 520.

2. Compare § 70-a.

3. In re Gray, 3 Am. B. R. 647; In re Griffith, 1 N. B. N. 546; In re Kindt, 2 N. B. N. Rep. 369. Compare Barker v. Bankers’ Assn., Fed. Cas. 986; In re Rockford, R. I. & St. L. R. Co., Fed. Cas. 11,978; Crooks v. Stewart, 7 Fed. 800; also Eyster v.

Gaff, 91 U. S. 521; Glenny v. Langdon, 98 U. S. 20; Dudley v. Easton, 104 U. S. 99; Batchelder & Lincoln Co. v. Whitmore, 10 Am. B. R. 641, 122 Fed. 355, where it was held that the trustee represents those who were creditors at the time the petition was filed.

4. McLean v. Mayo, 7 Am. B. R. 115; In re Ryan, Fed. Cas. 12,182.



Subs. a, (1), (2), (3).]

Suits by Trustees.

patible with the best interests of the parties.”<sup>5</sup> This he may do by, for instance, collecting accounts, even by suit, or selling goods or lands,<sup>6</sup> or proceeding to set aside fraudulent transfers<sup>7</sup> or preferential liens.<sup>8</sup> As a rule, however, save in the common and simpler steps of administration, he should consult the wishes of the creditors; in many matters the law requires him to do this.<sup>9</sup> The creditors usually decide. First meetings should be continued and kept alive for this purpose. The referee in charge may, in extreme cases, disapprove. Such action is, however, not usual.

**Suits by Trustees.**—A trustee's duty as to suits already pending in the name of or against the bankrupt has already been considered.<sup>10</sup> So has the time limitation on suits brought by or against him.<sup>11</sup> He only should sue.<sup>12</sup> Before doing so, he ought to submit the reasons for the suit to the creditors and secure an order, based on their action, from the referee.<sup>13</sup> Such consent seems not to be necessary when a suit is brought against him.<sup>14</sup> How far the question at issue shall be gone into on such a preliminary hearing is discretionary with the referee. He should at least be sure that there is a probable cause of action.<sup>15</sup> It would seem also that the proposed defendant, if a creditor and interested in the fund, may appear in opposition to a motion for permission to sue.<sup>16</sup> If a suit is ordered, it should be in the name of “‘John Doe,’ as trustee of ‘Richard Roe,’ a bankrupt.” Whether in no-asset cases security may be demanded by the proposed defendant is for the court in which the suit is brought to determine.<sup>17</sup>

5. In re Stein, 1 Am. B. R. 662, 94 Fed. 124.

6. Compare § 70-b; General Order XVIII.

7. See also, for instance, Barber v. Franklin, 8 Am. B. R. 468, and under Section Sixty.

8. See under Section Sixty-seven.

9. Compare §§ 11-b-c, 26, etc.; In re Baber, 9 Am. B. R. 406, 119 Fed. 520.

10. See under Section Eleven.

11. Id.

12. Id. Compare also, for when suit should not be brought, Reade v. Waterhouse, 52 N. Y. 587; Dulcher v. Bank, Fed. Cas. 4,203. See also In re Baird, 7 Am. B. R. 448, 112 Fed. 960, where referee erroneously refused to direct trustee to sue until

the moving creditor should indemnify the estate again expense of a possibly unsuccessful controversy.

13. In re Mersman, 7 Am. B. R. 46. But compare Chism v. Bank, 5 Am. B. R. 56. See also In re McCallum, 7 Am. B. R. 596, 113 Fed. 393; In re Mallory, Fed. Cas. 8,990; Traders' Bank v. Campbell, 14 Wall. 87.

14. Compare In re Kelly Dry Goods Co., 4 Am. B. R. 528, 102 Fed. 747.

15. In re Phelps, 3 Am. B. R. 396.

16. So ruled by the writer in February, 1902, in In re Mersmann II, unreported.

17. Where the suit is on a cause of action antedating the adjudication, security for costs will be required in

Where suits by a trustee shall be brought has already been considered.<sup>18</sup> Section Sixty should be consulted for suits to avoid preferences; Section Sixty-seven for suits to annul preferential or fraudulent liens; and Section Seventy for suits under state laws to avoid fraudulent transfers. The diverse character of the suits which may be brought by trustees is suggested by the cases in the foot-note.<sup>19</sup>

**Property Vested in Trustees.**— This is discussed under Section Seventy.

**Sales by Trustees.**— So also is the duty of trustees concerning and the practice on sales of assets of the estate.

**Employment of Attorneys.**— This, too, is considered elsewhere.<sup>20</sup>

**Rapidity in Administration.**— This is required not only by subdivision (2) of this subsection, but by other provisions found in the law and the General Orders.<sup>21</sup>

**Accounting for Interest.**— Subdivision (1) seems unnecessary. The former statute permitted a temporary investment of the funds where it appeared that distribution might be delayed by litigation.<sup>22</sup> The court or referee could doubtless order this now. Thus, there might be some interest earned. The frequency with which dividends must be paid,<sup>23</sup> however, makes any accumulation of interest unlikely. The trustee should, if possible, arrange with the official depository for interest. In any event, all interest received by a trustee must be accounted for.

**Deposits.**— The trustee cannot deposit the money of the estate save in a designated depository. These are fixed by standing orders of the court of bankruptcy.<sup>24</sup>

New York. *Joseph v. Makley*, 8 Am. B. R. 18.

18. Section Twenty-three.

19. *Mather v. Coe*, 1 Am. B. R. 504, 92 Fed. 333; *In re Brodbine*, 2 Am. B. R. 53, 93 Fed. 643; *In re Baudouine*, 3 Am. B. R. 55, 96 Fed. 536; *In re Cohn*, 3 Am. B. R. 421, 98 Fed. 75; *In re Crystal Springs Water Co.*, 3 Am. B. R. 194, 96 Fed. 945; *In re Gerdes*, 4 Am. B. R. 346,

102 Fed. 318; *Barker v. Franklin*, ante.

20. See under Section Sixty-two.

21. Compare §§ 47-a (10), 57-n, 65-b.

22. R. S., § 5060.

23. § 65-b, as amended, seems a partial reversal of this policy of the original law.

24. See Section Sixty-one.

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Subs. a, (6), (7), (8), (10).] Accounts and Reports.

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### III. Subs. a (6) (7) (8) (10). ACCOUNTS AND REPORTS.

**In General.**—As to accounts and reports, these subdivisions seem redundant. If a trustee follows them literally, he will spend much of his time in keeping accounts and making reports. Stripped of surplusage and read in with General Order XVII, the trustee is required (1) generally, to keep regular accounts of receipts and disbursements, and, specially (2) to prepare and file an inventory of the estate “immediately upon entering upon his duties,” (3) to report the condition of the estate within the first month after his appointment, and every two months thereafter, unless excused by the referee, and (4) to make and file a final report and account at least fifteen days before the final meeting. All this in addition to the twenty-day report on exemptions.<sup>25</sup> But, in effect, the “inventory” may be but a summary of the appraisers’ report;<sup>26</sup> and the bi-monthly reports required by subdivision (10) are rarely made. The purpose — that the trustee shall be always under the eye of the creditors and the referee — is apparent. So long as this is recognized, a trustee will, it is thought, perform his duty satisfactorily, even though he does not always have an accountant at his elbow.

**Practice.**—The difference between an account and a report should be noted; an account should deal only in dollars and cents;<sup>27</sup> a report should be a running summary of the details of administration. The trustee’s report that there are no assets seems also to be called a “return.”<sup>28</sup> The word “statement” is also used of a report where there are no assets. Whatever these papers be called, they should conform as far as possible to the official forms, should always be verified by the trustee, and, if reciting disbursements, usually be accompanied by vouchers. They should be filed with the referee, if the case has been referred. They should also be audited by the referee.<sup>29</sup> This seems, however, a precautionary provision, rather than a requirement. Accounts are usually submitted to creditors at meetings called for that purpose,<sup>30</sup> and, if passed by them, are approved.

25. General Order XVII.

26. See § 70-b, Form No. 13.

27. Forms Nos. 49 and 50.

28. Form No. 48.

29. General Order XVII; In re Baginsky, 2 Am. B. R. 243.

30. See § 58-a (6).

IV. Subs. a (4) (9). DISTRIBUTION.<sup>31</sup>

**Expenses of Administration.**— What a trustee may be allowed for expenses of administration is considered elsewhere.<sup>32</sup>

**Payment of Priorities.**— So also of his duty as to those persons entitled by the law to priority of payment.<sup>33</sup>

**Dividends.**— Likewise of dividends to creditors who have proved their claims.<sup>34</sup> The only provision here is that dividends must be paid within ten days after they are declared.

**Method of Payment.**— Subdivision (4) and General Order XXIX should be read together. No moneys can be properly disbursed by a trustee save “by check or draft on the depository.” The provisions of the statute and general order should be strictly followed,<sup>35</sup> and where payments have been made without compliance therewith they have been disallowed.<sup>35a</sup> Thus, if deposited in the district court, money can be withdrawn only by a check or warrant, signed by the clerk and countersigned by the judge, or by “a referee designated for that purpose.” The quoted words are usually availed of in composition cases.<sup>37</sup> While, if the money is deposited by the trustee, the referee must countersign each check. Payments should not be made upon orders drawn by the referee.<sup>37a</sup> The requirements of the General Order as to stub entries, numbering and the like, should be observed. Checks should always run to and be by the trustee mailed or delivered to the creditors, unless the power of attorney specifically authorizes the attorneys to receive and receipt therefor.<sup>38</sup> In disbursing dividends, a combination check and receipt, the latter attached to the check but marked off from it by a perforated line, and containing a statement that the check will not be paid on presentation unless the receipt is filled out and signed, has been found

31. In “Supplementary Forms,” post, will be found a final order of distribution, including a dividend sheet, the use of which, instead of Form No. 51 is suggested.

32. Section Sixty-two.

33. Section Sixty-four.

34. Section Sixty-five.

35. In re Cobb, 7 Am. B. R. 202, 112 Fed. 655.

35a. In re Hoyt & Mitchell, 11 Am. B. R. 784, 127 Fed. 968. And see In re Hoyt, 9 Am. B. R. 574, 119 Fed. 987.

36. General Order XXIX.

37. Compare under Section Twelve.

37a. In re Cobb, 7 Am. B. R. 202, 112 Fed. 655.

38. See Form No. 20; Form No. 21 is not enough.

## Subs. a, (5), (11).] Exemptions; Furnishing Information.

convenient.<sup>39</sup> Trustees will also find it time-saving to recite on the face of the check the name and number of the estate, whether it is a first, second, or final dividend, and the rate per cent.<sup>40</sup> To this end, dividend checks, if numerous, should be specially printed; if not, the use of rubber stamps containing the suggested information will be found inexpensive and effective. But checks should not be signed or countersigned by such a stamp.

**Trustee's Supplemental Report.**— Though not required, safety seems to suggest that the trustee file a supplemental report after the distribution is complete. This should show every allowance or expense paid and every dividend disbursed; and vouchers, signed by the creditors and others, and numbered, if possible, to correspond to the check numbers, or attached to the returned checks, should be filed at the same time. Not until such report is filed should the trustee be discharged.<sup>41</sup>

## V. Subs. a (5) (11). MISCELLANEOUS DUTIES.

**Setting Apart Exemptions.**— Here Section Six should also be consulted. Courts of bankruptcy have power to "determine all claims of bankrupts to their exemptions."<sup>42</sup> Preliminary to this, the trustee must "set apart the bankrupt's exemptions and report on the items and estimated value thereof." This should be done within twenty days after the trustee receives notice of his appointment.<sup>43</sup> Thus, the trustee acts in a quasi-judicial capacity in the first instance, and, if there is no exception taken, the referee usually approves. But any creditor — it seems not the bankrupt — may take exception to the trustee's action.<sup>44</sup> If exception is taken, the practice is defined in General Order XVII. This whole subject was also regulated by a general order under the former law.<sup>45</sup>

**Furnishing Information.**— The trustee's duty here is similar to the referee's.<sup>46</sup> He is also liable to the same penalties.<sup>47</sup> This duty

39. See "Supplementary Forms," post.

40. See Rule 14 (10) in the writer's district, 1 N. B. N. 115.

41. Compare, however, to the contrary, Form No. 51.

42. § 2 (11).

43. General Order XVII, Form No. 47.

44. For forms, see "Supplementary Forms," post.

45. Act of 1867, General Order XIX.

46. § 39-a (3).

47. § 29-c (3). See also § 29-a.

is akin to that of frequent accountings, the latter seeming for the whole body of creditors, the former for any individual who may request. Any person interested in the bankrupt estate has a right to an inspection of the accounts and papers of the trustee,<sup>47a</sup> and to any information in respect to the estate which the trustee can impart.<sup>47b</sup> It is not thought, however, that, in answering inquiries by mail, the trustee can use the "official business" envelope, as can the referee. Cases under the former law are still in point.<sup>48</sup>

**In General.**—The trustee also has other miscellaneous duties, as, for instance, the examination and correction of proofs of debt,<sup>49</sup> attendance on examinations of the bankrupt, and to assist the creditors and the referee generally in the realization and distribution of assets.

#### VI. Subs. b. CONCURRENCE OF TWO OF THREE TRUSTEES NECESSARY.

**In General.**—Three trustees are rarely appointed. If they are, a majority must always concur. This seems a variance from the rule that a trust to two or more is vested in all and that all must, therefore, join in exercising it. The law being mandatory in requiring either one or three trustees,<sup>50</sup> it seems doubtful whether, on the death of one, the survivors can do anything until the vacancy is filled in the regular way.<sup>51</sup>

#### VII. Subs. c. TRUSTEE TO RECORD CERTIFIED COPY OF ADJUDICATION.

**Amendment of 1903.**—This subsection was added in the Senate revision of the Ray bill. Section 21-e seems to have been overlooked. There can be no doubt, however, as to the meaning of the new subsection. The trustee is bound within the time limited to file, which doubtless means also to record, in all counties where the bankrupt has real estate, a certified copy of the decree of adjudica-

<sup>47a</sup>. § 49, post.

<sup>47b</sup>. *Matter of Petersen*, 10 Am. B. R. 353, 122 Fed. 101.

<sup>48</sup>. *In re Perkins*, Fed. Cas. 10,982; *In re Blaisdell*, Fed. Cas. 1,488.

<sup>49</sup>. Compare Section Fifty-seven.

<sup>50</sup>. § 44.

<sup>51</sup>. *Id.* But see § 46.

Subs. c.]

Certified Copy of Adjudication.

tion. It is unfortunate that this filing is not in words given the effect of actual notice. Thus the recording of the certified copy of the order approving the trustee's bond is still essential.<sup>52</sup> Careful trustees will see that both these copies are recorded. This new duty is put only on trustees in proceedings begun after February 5, 1903.<sup>53</sup>

<sup>52</sup>. See in Section Twenty-one of this work.

<sup>53</sup>. See "Supplementary Section to Amendatory Act," post.

## SECTION FORTY-EIGHT.

### COMPENSATION OF TRUSTEES.

§ 48. **Compensation of Trustees.**— *a* Trustees shall receive<sup>1</sup> for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions<sup>2</sup> *on all moneys disbursed by them\** as may be allowed by the courts, not to exceed<sup>3</sup> *six\** per centum on the first five<sup>4</sup> *hundred\** dollars or less, *four\** per centum on<sup>6</sup> *moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars,\** and one per centum on<sup>7</sup> *moneys\** in excess of ten thousand dollars. *And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.\**

*b* In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

*c* The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

1. Here the words "as full compensation" were stricken from the original law by the amendatory act of 1903.

2. Here the words in italics were substituted for the words "sums to be paid as dividends and commissions," which occurred in the original law, by such amendatory act.

3. Here the word "six" was substituted for the word "three" by such act.

4. Here the word "hundred" was

substituted for the word "thousand" by such act.

5. Here the word "four" was substituted for the word "two" by such act.

6. Here the words in italics were substituted for the words "the second five thousand dollars or part thereof" which occurred in the original law, by such act.

7. Here the word "moneys" was substituted for the words "such sums" by such act.



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§ 48.]           Synopsis of Section; Comparative Legislation.

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**Analogous provisions:** In U. S.: Act of 1867, §§ 28, 47, R. S., §§ 5099, 5124, 5127, 5127A; Act of 1841, § 6; Act of 1800, § 29.

In Eng.: Act of 1883, § 72; Act of 1890, § 15; General Rules 125, 305, 306.

**Cross references:** To the law: §§ 2 (5); 40; 51 (2); 72.

To the General Orders: XXXV (3).

To the Forms: None.

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SYNOPSIS OF SECTION.

**I. Subs. a. Compensation of Trustees.**

Comparative Legislation.

Under the Original Law.

*Pauper Cases.*

Since the Amendatory Act of 1903.

**II. Subs. b. Apportioning Compensation Between Several Trustees.**

In General.

**III. Subs. c. Withholding Compensation when Trustee Removed.**

Only if for Cause.

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I. Subs. a. COMPENSATION OF TRUSTEES.

**Comparative Legislation.**—In England, the fees of trustees are fixed by resolution of the creditors, subject to a review, under certain conditions, by the Board of Trade.<sup>8</sup> Prior to the present law, assignee's fees in this country have been "in the discretion of the court."<sup>9</sup> The amendatory act of 1874 reduced the customary fees then paid by one-half.<sup>10</sup> The present method is doubtless an adaptation of the state systems for compensating executors, administrators, receivers, and the like. The changes made by the amendatory act of 1903 are thought to strike a fair mean between the loose methods of the old law and the niggardly rigidity of the present statute as originally passed.<sup>11</sup>

**Under the Original Law.**—Three general considerations as to trustees' compensation should be noted: (1) that fixed by this sec-

8. Act of 1883, § 72; General Rules 305, 306.

9. See "Analogous Provisions," ante.

10. R. S., § 5127-A.

11. Compare pp. 23-25, Report of Ex. Com. of Nat. Assn. of Referees in Bankruptcy, March, 1900.

tion is "full compensation for their services," save that which may be allowed under § 2 (5),<sup>12</sup> as now amended; (2) the exact percentage, not greater than the prescribed upward limit, is fixed by the court, there being in this a difference between the fees of referees and those of trustees,<sup>13</sup> and (3) no compensation is payable until after the services are rendered, *i. e.*, when the administration is closed. The compensation is of two kinds, a filing fee and certain commissions. Before the amendatory act of 1903, the latter could be reckoned only on "dividends and commissions,"<sup>14</sup> and the rate was but about half that customarily allowed corresponding officers even fifty years ago.<sup>15</sup> The result was that few competent men would serve as trustee the second time, thus crippling the administration of the law. Efforts were made to meet the difficulty in various ways, as by appointing attorneys to be trustees and allowing them compensation for legal services as an expense of administration,<sup>16</sup> by appointing attorneys for trustees in asset cases, with a tacit understanding that the attorneys' allowance should be shared with the trustee, or by allowing trustees extra compensation as agents of the creditors when they did more than perform the regular duties required by the law.<sup>17</sup> Each of these methods was of doubtful legality and subject to abuse. Since § 72, added by the amendatory act, they are no longer possible.

*Pauper Cases.*—In certain cases, the trustee may serve without pay.<sup>18</sup> It has been thought, however, that, unlike the referee, a trustee cannot be compelled to serve in a pauper case, but, if the creditors desire him to do so, they must furnish his fee.<sup>19</sup>

**Since the Amendatory Act of 1903.**—The recent action of Congress has modified the original law as to trustees' fees in four particulars, all intended to make them more adequate. The filing fee was doubled by the Ray bill. The Senate, however, struck out the

12. See pp. 19-21, ante, and General Order XXXV (3).

13. See § 40-a.

14. In re Utt, 5 Am. B. R. 383, 105 Fed. 754; In re Smith, 5 Am. B. R. 559, 108 Fed. 39; In re Kaiser, 8 Am. B. R. 108, 112 Fed. 955; In re Mammoth, etc., Co., 8 Am. B. R. 651, 116 Fed. 731; In re Goldville Mfg. Co., 10 Am. B. R. 552, 123 Fed. 579. Contra, In re Barber, 3 Am. B. R. 306, 97 Fed. 547. Under the act prior to the amendment it was held that trustees were entitled to commissions on funds arising from sales of mortgaged property and distributable to

mortgage creditors. In re Mulhauser, 9 Am. B. R. 80.

15. Compare Rule 59, So. District of N. Y., under law of 1841, Owen on Bankruptcy, Appendix, p. 13.

16. In re Mitchell, 1 Am. B. R. 687. Contra, In re Muldaur, Fed. 9,905.

17. In re Plummer, 3 Am. B. R. 320. Contra, In re Epstein, 6 Am. B. R. 191, 109 Fed. 878. See also In re Mammoth, etc., Co., supra.

18. See § 51-a (2).

19. In re Levy, 4 Am. B. R. 108, 101 Fed. 247.

Subs. a.]

Since Amendatory Act of 1903.

change, and that fee is now the same as in the original law.<sup>20</sup> The changes, of course, affect only cases begun on or after February 5, 1903.<sup>21</sup>

Commissions are to be computed hereafter on "all moneys disbursed," *i. e.*, on the whole estate as vested and disbursed. These words are substantially the same as "received and paid out," which were used in the Ray bill and are found in the New York Code of Civil Procedure,<sup>22</sup> fixing the commissions of executors and administrators, and cases construing that section and its predecessors before the code will be found in point.<sup>23</sup> Here there is a distinction between the basis of the compensation of the referee and the trustee; that of the former is reckoned only on "moneys disbursed to creditors." It is not thought that the new phrasing entitles the trustee to commissions on property not converted into money,<sup>24</sup> but turned over at an agreed value to a creditor, though such cases will be rare; there is a distinction in the statute between "money" and "property."<sup>25</sup> The result of the new clause is to charge the commissions of trustees and referees entirely on the fund applicable for dividends to the unsecured creditors. As to expenses of administration and priority debts, this is in accord with equity, the rights of parties claiming against the estate under § 62 or § 64 being superior to those of the general creditors. If, however, a secured creditor chooses to realize through the bankruptcy court, and the trustee thereby receives and pays out money, the equities are strongly against the secured creditor, and he should pay the commissions.<sup>26</sup> Whether, if in such a case property but not money is received and turned over by the trustee, the latter is entitled to commissions is a question.<sup>27</sup> A trustee is now entitled

20. See § 51-a (2) (4).

21. See "Supplementary Section to Amendatory Act," post.

22. § 2730.

23. For instance, *Hosack v. Rogers*, 9 Paige, 460; *Rundle v. Allison*, 34 N. Y. 180; *Betts v. Betts*, 4 Abb. N. C. 317, 437; *Cox v. Schermerhorn*, 18 Hun (N. Y.), 16.

24. Compare *Burtis v. Dodge*, 1 Barb. Ch. (N. Y.) 77. But see also *Thompson v. Pritchard*, 12 Week. Dig. (N. Y.) 80.

25. As in a subsequent clause of

this subsection. See also §§ 1 (25), 60-d.

26. In *re Sanford Mfg. Co.*, 11 Am. B. R. 414, 126 Fed. 888. The reasoning in *In re Barber*, 3 Am. B. R. 306, 97 Fed. 547, is in point. See also *In re Sabine*, 1 Am. B. R. 322.

27. The distinction between "money" and "property" made by the statute would not here be applicable. The secured creditor makes use of the system because it is apparently less expensive. Whether what he receives is money or land,

to commissions on all sums which, but for an outside agreement between the parties and their attorneys, would have been paid through the trustee.<sup>27a</sup> It should always be borne in mind that no commissions can be paid or withheld until allowed by the court,<sup>28</sup> and, in any event, only in such amount "as may be allowed by the court."

(2) The rate per cent. of commissions has been considerably increased, but only in small or medium-sized cases. On estates of over ten thousand dollars it remains unchanged. The purpose clearly is, on the one hand, an additional incentive to the discovery of assets in estates where the schedules show little or nothing, and a moderate increase in compensation in larger estates which, being spread over a goodly total, will not be felt. Thus, the rate on the first five hundred dollars is now six per cent. instead of three per cent., on the next one thousand dollars four per cent. instead of three per cent., on the next eight thousand five hundred dollars two per cent. instead of about two and two-fifths per cent.,<sup>29</sup> and, on the balance, one per cent., as now. That these fees are reckoned on "moneys disbursed," will also add materially to a trustee's emoluments in small cases.

(3) When a trustee has been appointed and qualified in a case resulting in a composition, he may be allowed "not to exceed one-half of one per centum of the amount to be paid to creditors." A trustee is rarely appointed in such cases,<sup>30</sup> but may be. As the law stood before the amendatory act of 1903, he could be allowed nothing. This is now corrected, and he is paid at the same rate as is the referee.

(4) The omission of the words "as full compensation" is clearly to harmonize this section with § 2 (5). Under the latter, where the business of a bankrupt is ordered continued by a trustee, the court may allow additional compensation to him.<sup>31</sup> General Order XXXV (3) is, however, in no wise changed by the amendments. Under it, the compensation of trustees cannot be other or more

he should pay the officers through whom it comes for their services, provided he has himself asked the relief. By analogy only, it seems, need these be the commissions fixed by the law.

<sup>27a</sup> In re Sanford Mfg. Co., 11 Am. B. R. 414, 126 Fed. 888.

<sup>28</sup> In re Hughes, Fed. Cas. 6,841;

In re Noyes, Fed. Cas. 10,371; In re Dean, Fed. Cas. 3,699.

<sup>29</sup> This apparent decrease is not actual because of the changed basis of computation, and the larger rates on the first \$500 and \$1,500.

<sup>30</sup> See In re Rung, 2 Am. B. R. 620.

<sup>31</sup> See p. 20, ante.

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Subs. b, c.]      Apportionment; Withholding upon Removal.

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than that fixed by § 2 (5) and § 48. This is emphasized by § 72, added by the amendatory act of 1903.

## II. Subs. b. APPORTIONING COMPENSATION BETWEEN SEVERAL TRUSTEES.

**In General.**— Whether there be three trustees or one, the compensation to all cannot be more than to one. But the court must apportion the amount between the trustees “according to the services actually rendered.” This is contrary to the usual rule.<sup>32</sup>

## III. Subs. c. WITHHOLDING COMPENSATION WHEN TRUSTEE REMOVED.

**Only if for Cause.**— The rule here stated needs no comment.<sup>33</sup> But a mere resignation or a vacancy because of disqualification discovered after appointment would not bar the trustee from compensation. In all such cases, the proportion should be fixed in accordance with subsection b.<sup>34</sup>

<sup>32</sup>. Compare *White v. Bullock*, 15 How. Pr. (N. Y.) 102. For similar rules as to the referee, see § 40-b.

<sup>33</sup>. See generally under Section Forty-six.

<sup>34</sup>. A similar rule is applied to the referee, § 40-c.

## SECTION FORTY-NINE.

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### ACCOUNTS AND PAPERS OF TRUSTEES.

**§ 49. Accounts and Papers of Trustees.**— *a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

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**Analogous provisions:** In U. S.: R. S., § 5062B.

In Eng.: Generally to the General Rules, as Rules 217, 225, 226, 244, 273 (10), 290.

**Cross references:** To the law: §§ 29-a; 47-a (6) (7) (8) (10) (11).

To the General Orders: XVII.

To the Forms: None.

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### I. ACCOUNTS AND PAPERS OF TRUSTEES.

**In General.**— That the accounts and papers of trustees shall always be open to the inspection of officers and all parties in interest, seems to follow from § 47-a.<sup>1</sup> This section is, therefore, of little importance. "Accounts and papers" includes the books of the bankrupt in the possession of the trustee; in fact, any documents whether originated by him or received by him from the bankrupt. The penalties for secreting documents and for refusing to permit inspection are discussed elsewhere.<sup>2</sup>

1. See pp. 369, 370, ante.

2. See under Section Twenty-nine.

## SECTION FIFTY.

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### BONDS OF REFEREES AND TRUSTEES.

§ 50. **Bonds of Referees and Trustees.**— *a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

*b* Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

*c* The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

*d* The court shall require evidence as to the actual value of the property of sureties.

*e* There shall be at least two sureties upon each bond.

*f* The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

*g* Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

*h* Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

*i* Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

*j* Joint trustees may give joint or several bonds.

*k* If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

*l* Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

*m* Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

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**Analogous provisions:** In U. S.: *As to registers' bonds*, Act of 1867, § 3, R. S., § 4995; *As to assignees' bonds*, Act of 1867, § 13, R. S., § 5036; Act of 1841, § 9.

**In Eng.:** As to trustees, § 21 (2); General Rule 342.

**Cross references:** To the law: §§ 21-e; 25-c.

To the General Orders: General Order XVI.

To the Forms: Nos. 17, 24, 25, 26.

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## SYNOPSIS OF SECTION.

### I. Bonds of Referees and Trustees.

Subs. a. Of Referees.

Subs. b, c. Of Trustees.

Subs. d, e, f, g. Sureties, etc.

Subs. h. Where Filed.

Subs. i, j, l, m. Suits on Bonds.

Subs. k. Effect of Failure to Give Bonds.

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### I. BONDS OF REFEREES AND TRUSTEES.

**Subs. a. Of Referees.**—The referee, though a judicial officer, is required to give a bond. So was the assignee under the former



§ 50.]

Bonds of Trustees; Sureties, etc.

law.<sup>1</sup> The amount, the sufficiency of the sureties, and the time within which the bond must be filed are usually fixed in the order of appointment. The condition is "the faithful performance of their official duties." The amount cannot be larger than five thousand dollars. A referee cannot act as such until he has filed his bond. Form No. 17 should be used. There are no adjudicated cases under either law.

**Subs. b, c. Of Trustees.**— A trustee, too, must give a bond. This was not necessarily so under the former law; the judge might order the assignee to give a bond and, on the request in writing of a creditor, was required so to order.<sup>2</sup> Trustees' bonds must be given within ten days after appointment, or within five days additional if permitted by the court. This seems mandatory, but the practice of extending the time still further when no objection is made is quite general. The condition is the same as that in referees' bonds. But the creditors, not the court, fix the amount of a trustee's bond. This should be done at the first meeting, immediately after the appointment of the trustee. If the creditors fail so to do, the judge or referee fixes it. The amount is specified in the notice of appointment.<sup>3</sup>

**Subs. d, e, f, g. Sureties, etc.**— Where bonds are given by individuals, there must be two sureties; if by a bonding company, there need be but one.<sup>4</sup> The sureties, if individuals, must be worth "above their liabilities and exemptions," the penal sum mentioned in the bond. As to this, the "court shall require evidence." In actual practice, this is often done by adding affidavits of justification to the bond.<sup>5</sup> This is, of course, not required of bonding companies in good standing. Joint trustees should give joint and several bonds. The form of the bond is prescribed.<sup>6</sup> But, as has been suggested elsewhere, Form No. 26, the order approving the bond, should usually be modified by inserting certain dates, that when a certified copy is recorded in a local registry office, parties interested in titles passing from a bankrupt to his trustee, may have the same information that would be given had the bankrupt actu-

1. § 3, R. S., § 4995.

2. § 13, R. S., § 5036. Compare

In re Sands, Fed. Cas. 12,301.

3. See General Order XVI and Form No. 24.

4. In re Kalter, 2 Am. B. R. 590.

Compare Act of August 13, 1894.

5. See form in "Supplementary Forms," post.

6. Form No. 25.

ally executed a deed.<sup>7</sup> The practice of giving surety company bonds is now quite general. They are sufficient if the company is within the terms of subsection g.

**Subs. h. Where Filed.**— Referees' and trustees' bonds must be filed and recorded in the office of the clerk. A trustee's bond is usually approved by the referee, whose duty it is forthwith to transmit the bond and the order of approval to the clerk.

**Subs. i, j, l, m. Suits on Bonds.**— Though the bond runs to the United States, a suit may be brought thereon "in the name of the United States for the use of any person injured." Leave of court is not necessary for the bringing of such an action in the name of the United States.<sup>7a</sup> Such an action may be brought in a district court of the United States.<sup>7b</sup> The limitation on such suits is, however, short: as to referees, two years after the alleged breach; as to trustees, two years after the estate has been closed. The closing of an estate here is probably the date of the order discharging the trustee. Subsection i provides, however, that trustees shall not be liable, personally or on their bonds, for any penalties or forfeitures incurred by bankrupts under the act.

**Subs. k. Effect of Failure to Give Bonds.**— Failure to give a bond within the time limited amounts to a declination of office and creates a vacancy. As above suggested, this requirement has not been very strictly construed. The time would probably run from the date of the receipt of the notice, rather than from the date of the order fixing the amount.

<sup>7</sup> See Section Twenty-one, ante. See also requirement of § 47-c which was added by the amendatory act of 1903.

<sup>7a</sup> *Alexander v. Union Surety & Guar. Co.*, 11 Am. B. R. 32, 89 N. Y. App. Div. 3.

<sup>7b</sup> *United States ex rel. Schauffler v. Union Surety & Guar. Co.*, 9 Am. B. R. 114, 118 Fed. 482, containing form of complaint.

## SECTION FIFTY-ONE.

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### DUTIES OF CLERKS.

§ 51. **Duties of Clerks.**— *a* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

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**Analogous provisions:** In U. S.: None.

In Eng.: None.

**Cross references:** To the law: §§ 18-f-g; 38-a (3); 39-a (8) (10); 40; 48; 52; 59; 64-b (2); 71.

To the General Orders: I, II, III, X, XX, XXIX, XXXV (1).

To the Forms: Nos. 12, 14, 15, 57.

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### SYNOPSIS OF SECTION.

#### I. Duties of Clerks.

Subds. (1) (3). **Miscellaneous Duties.**

Subds. (2) (4). **Receipt and Payment of Fees.**

*Payment.*

Subd. (2). **Pauper Affidavits.**

**Additional Duties.**

## I. DUTIES OF CLERKS.

**Subds. (1) (3). Miscellaneous Duties.**—General Orders I, II, and III should be read with this section. The clerk has his usual duties as to the keeping of a docket of bankruptcy cases, the filing of papers,<sup>1</sup> and the issue of process.<sup>2</sup> In the absence of the judge, he refers cases to the referee for adjudication.<sup>3</sup> It seems also he should give notice to creditors of the order to show cause on discharge,<sup>4</sup> though, as has been indicated,<sup>5</sup> this is often done by the referee. For any disbursements he may be called on to make, he, like the referee, can demand indemnity.<sup>6</sup> The duty enjoined by subdivision (1) is similar to that required of him as to all other fees, and indicates that fees in bankruptcy are not in addition to his salary as fixed by law. The duty enjoined by subdivision (3) corresponds to that of the referee as fixed in § 39-a (10).

**Subds. (2) (4). Receipt and Payment of Fees.**—The clerk is also required "to collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition," except in pauper cases. The amounts of these fees are fixed in other sections.<sup>7</sup> Unless the fees are paid, no pauper affidavit being filed, the petition need not be received. Early in the history of the law, it was a question whether partners who had no assets, and sought bankruptcy merely to secure a discharge, should not be required to deposit separate fees for the individual estates and that of the copartnership.<sup>8</sup> The better opinion is that they need not;<sup>9</sup> such a petition is but one proceeding. There is a recorded instance of husband and wife filing a petition together and being permitted to proceed on the deposit of one fee; but they were to an extent partners in business as well. The rule is indicated in the words "in

1. Compare §§ 39 (5) (7) (8) (10); 59-c.

2. See Forms Nos. 5, 30. See also Section Seventy-one of this work.

3. § 18-f-g. See also § 38-a (3).

4. Form No. 57.

5. See pp. 171, 172, ante.

6. General Order X.

7. For the referee's, see § 40-a; for the trustee's, § 48-a; for the clerk's, § 52-a.

8. Compare *In re Barden*, 4 Am. B. R. 31, 101 Fed. 553. See also *Mahoney v. Ward*, 3 Am. B. R. 770, 100 Fed. 278.

9. *In re Langslow*, 1 Am. B. R. 258, 98 Fed. 869; *In re Gay*, 3 Am. B. R. 529, 98 Fed. 870. Contra, however, is the late case of *In re Farley*, 8 Am. B. R. 266, 115 Fed. 359, which follows *In re Barden*, *supra*.

Subd. (2).]

Pauper Affidavits.

each case." If a single adjudication can be made affecting all the petitioners, one fee is sufficient; but not otherwise.<sup>10</sup>

*Payment.*—The clerk's fee seems to be earned on the filing of the petition; the referee's and the trustee's when the case is closed. As to trustees, an estate is closed when the trustee is discharged; as to the referee, when he has transmitted his records. These restrictions on payment, however, are not always strictly observed.<sup>11</sup> Payments are made by check or order in accordance with General Order XXIX. In the larger districts, the referees often certify each week or month for fees due the trustees and themselves. Provision is elsewhere made for the return out of the estate of fees deposited by petitioning creditors in involuntary cases.<sup>12</sup> There is, however, no provision for the repayment of the trustee's fee when no trustee is appointed. This is usually done by a check to the bankrupt or his attorney, after the case is closed.

**Subd. (2). Pauper Affidavits.**—A "poor person" may avail himself of the bankruptcy law, by filing with his petition a pauper affidavit. Contrary to the usual practice, he may get into court and become entitled to adjudication and, it seems, protection, without the usual preliminary inquiry as to his alleged poverty. Before the adoption of the General Orders, this provision was much abused,<sup>13</sup> and various means were devised to check the practice of filing pauper affidavits in unworthy cases. It is not thought, however, that a refusal to discharge until the fees are paid<sup>14</sup> is any more defensible than would be a refusal to file for the same reason. Ample power is now given to investigate the truth of the pauper affidavit,<sup>15</sup> and to report that it is not true, if it appears that a fraud on the court has been attempted.<sup>16</sup> It is suggested also that

10. In re Langslow, ante.

11. In the writer's district, the word "closed" is liberally interpreted by rule. See 1 N. B. N. 110.

12. § 64-b (2). See also In re Matthews, 3 Am. B. R. 265, 97 Fed. 772; In re Silverman, 3 Am. B. R. 227, 97 Fed. 325.

13. Of one of the districts in Alabama, it was, early in 1900, stated: "It (the pauper petition clause) has induced much perjury in this district. One lawyer has been disbarred because of it, and several others have

been led into unprofessional conduct."

14. See rule in District of Washington, 1 N. B. N. 376, 95 Fed. 120. And compare In re Langslow, ante; In re Plimpton, 4 Am. B. R. 614, 103 Fed. 775.

15. General Order XXXV (4).

16. The practice suggested by the following rule adopted by Judge Cox of the Northern District of New York, has proven effective:

V. In case a petition is filed by a proposed voluntary bankrupt which is

through an examination had to test the truth of the affidavit, the bankrupt will often be found able to make the deposit. The affidavit must state that "the petitioner is without, and cannot obtain, the money with which to pay such fees." On examination as to its truth, it will usually be held false if it appears that he has exempt property,<sup>17</sup> or has paid an attorney for services in preparing the petition and schedules, or, it has been held, if the bankrupt is at the time earning fair wages.<sup>18</sup> The cases are, however, not uniform.<sup>19</sup> The necessity of, in some way, securing the fee of the trustee when one is appointed has already been considered.<sup>20</sup>

**Additional Duties.**— The amendatory act of 1903 has added § 71 to the original law. It prescribes other duties for the clerk.<sup>21</sup> It might well have been subdivision b of this section. It should be read with it.

accompanied by an affidavit under subdivision 2 of Section 51 of the act, it shall be the duty of the clerk to file said petition without the payment of the fees provided for by law. If the clerk, or the referee to whom said petition is referred, has reason to believe such affidavit is false, he may file a certificate to that effect and cause the bankrupt to be examined. If upon such examination the referee reports in writing that the statements contained in such affidavit are false, and that the bankrupt has or can obtain money with which to pay said fees, such report shall be sufficient

proof upon which to base proceedings under subdivision 4 of general order No. XXXV. See also "Supplementary Forms," post.

17. *In re Bean*, 4 Am. B. R. 53, 100 Fed. 262.

18. *In re Collier*, 1 Am. B. R. 182, 93 Fed. 191. Compare also *In re Williams*, 2 N. B. N. Rep. 206.

19. Compare the cases just cited with *Sellers v. Bell*, 2 Am. B. R. 529, 94 Fed. 802.

20. See p. 376, ante.

21. See Section Seventy-one of this work.

## SECTION FIFTY-TWO.

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### COMPENSATION OF CLERKS AND MARSHALS.

§ 52. **Compensation of Clerks and Marshals.**—*a* Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

*b* Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

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**Analogous provisions:** In U. S.: Act of 1867, § 47, R. S., §§ 5124, 5125, 5127, 5127A; Act of 1841, § 13; Act of 1800, §§ 46, 47.

In Eng.: None.

**Cross references:** To the law: §§ 2 (3); 51 (2); 71.

To the General Orders: X, XIX, XXXV (1) (4).

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Subs. a. Compensation of Clerks.

The Filing Fee.

Other Fees.

#### II. Subs. b. Compensation of Marshals.

Fixed by General Law.

While Acting as Receiver.

*Accounts of Marshals.*

## I. Subs. a. COMPENSATION OF CLERKS.

**The Filing Fee.**— This is fixed at ten dollars, and must be paid before a petition is filed.<sup>1</sup> It, too, is "full compensation." The Supreme Court has, by General Order XXXV (1), interpreted the quoted words.

**Other Fees.**— But clerks may charge the fees allowed them by law for copies of papers in bankruptcy proceedings furnished to persons other than the referees or other officers, or expenses necessarily incurred in publishing or mailing notices or other papers. In some districts, it is even prescribed by rule that clerks may charge a fee for copying and mailing the petition and order known as Form No. 57.<sup>2</sup> The validity of such a rule is doubted. It is a severe stretch of meaning to declare such mandates "copies furnished to other persons." Money so collected is not for "expenses," but for fees pure and simple. Besides, it is thought, General Order XXXV (1) is not in accord with § 52-a; if not, the latter must control. What has been said elsewhere as to pauper cases<sup>3</sup> and the right to demand indemnity applies<sup>4</sup> to clerks, as well. The clerks are now salaried officers.<sup>5</sup> Any surplus of fees collected must be turned into the treasury.<sup>6</sup> § 71, added by the amendatory act of 1903, also authorizes the clerks to charge fees for bankruptcy searches.

## II. Subs. b. COMPENSATION OF MARSHALS.

**Fixed by General Law.**— The marshals and their field deputies are now also salaried officers.<sup>7</sup> They play small parts in the administration of the present bankruptcy law. Under the former law, they acted as messengers as well as custodians, and their fees were fixed by the statute.<sup>8</sup> Under the present statute, the only duties they are usually called upon to perform are the service of subpoenas and writs of injunction,<sup>9</sup> and the taking possession of and

1. § 51 (2).

2. See *In re Durham*, 2 N. B. N. Rep. 1104. See also under Section Thirty-nine, ante.

3. See under Section Fifty-one.

4. General Order X.

5. Under the former statute, their fees were limited to those fixed by

the general law. See "Analogous Provisions," ante.

6. Act of May 28, 1896.

7. This, only since Act of May 28, 1896.

8. See "Analogous Provisions," ante.

9. Compare §§ 11-a, 18-a; Equity Rules XIII, XV.



Subs. b.]

Marshal's Fees as Receiver.

caring for property.<sup>10</sup> Their fees in either case are those fixed by the general law.<sup>11</sup> They also may demand indemnity.<sup>12</sup> When a petition accompanies an order, the statutory fee, it seems, can be charged for each paper, though they are bound together.<sup>13</sup>

**While Acting as Receiver.**—This subject is considered elsewhere.<sup>14</sup> It seems that a marshal cannot act as a receiver in bankruptcy.<sup>15</sup>

*Accounts of Marshals.*—This is regulated by General Order XIX, which requires no comment.<sup>16</sup>

10. See §§ 2 (3), 3-e, and 69.

11. R. S., § 829.

12. General Order X.

13. In re Damon, 5 Am. B. R. 133, 104 Fed. 775.

14. See under Section Two. See also In re Woodard, 2 Am. B. R.

692, 95 Fed. 955; In re Scott, 3 Am.

B. R. 625, 99 Fed. 404; In re Adams, etc., 4 Am. B. R. 107, 101 Fed. 215.

15. Act of May 28, 1896, § 20.

16. The referee has a similar duty, General Order XXVI.

## SECTION FIFTY-THREE.

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### DUTIES OF ATTORNEY-GENERAL.

§ 53. **Duties of Attorney-General.**—*a* The attorney-general shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

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**Analogous provisions:** None.

**Cross references:** None.

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### I. ATTORNEY-GENERAL'S REPORTS.

**In General.**—These reports will be found in the annual reports of the Attorney-General beginning with that of 1898.

## SECTION FIFTY-FOUR.

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### STATISTICS OF BANKRUPTCY PROCEEDINGS.

§ 54. **Statistics of Bankruptcy Proceedings.**—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the attorney-general, for statistical purposes, within ten days after being requested by him to do so.

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**Analogous provisions:** In U. S.: R. S., § 5127B.

**Cross references:** To the law: None.

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#### I. STATISTICS.

**In General.**—These reports are called for by the clerks at the request of the Attorney-General, and are made on blanks furnished by the Department of Justice. From them the Attorney-General's annual report, required by § 53, is compiled. He can also ask for other or special reports from all the districts or a single district. There are no recorded cases construing this section.

## SECTION FIFTY-FIVE.

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### MEETINGS OF CREDITORS.

§ 55. **Meetings of Creditors.**— *a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

*b* At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

*c* The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

*d* A meeting of creditors, subsequent to the first one, may be held at any time and place when all the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

*e* The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

*f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

§ 55.]

Synopsis of Section; Scope of Section.

**Analogous provisions:** **In U. S.:** *As to time and place of first meeting*, Act of 1867, § 11, R. S., §§ 5019, 5032; Act of 1841, § 7; Act of 1800, § 6; *As to presiding officer at first meeting*, Act of 1867, § 12, R. S., § 5033; *As to allowance of claims at first meeting*, see Analogous Provisions under Section Fifty-seven, *post*; *As to other meetings*, Act of 1867, §§ 27, 28, R. S., §§ 5092, 5093, 5098; *As to the final meeting*, Act of 1867, § 28, R. S., §§ 5093, 5096.

**In Eng.:** *As to first meeting*, Act of 1883, Schedule I, Rules 1-4; *As to subsequent meetings*, Act of 1883, § 89 (2); Act of 1890, § 18; Act of 1883, Schedule I, Rules 5-7; and, generally, *as to meetings of creditors*, General Rules 249-257.

**Cross references:** **To the law:** *As to adjudications*, §§ 18, 38 (4); *As to orders of reference*, § 18-f-g; *As to notice of meetings*, § 58; *As to allowance of claims*, § 57; *As to voting at creditors' meetings*, § 56; *As to choosing a trustee*, § 44; *As to examination of bankrupt*, §§ 7 (9), 21-a; *As to final meetings*, §§ 47-a (8), 65.

**To the General Orders:** IV, XV, XXV.

**To the Forms:** Generally to those referred to under the sections and general orders just mentioned.

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## SYNOPSIS OF SECTION.

### I. Subs. a, b, c. First Meetings.

Scope of Section.

In General.

Order of Business.

### II. Subs. d, e. Special Meetings.

In General.

On Call of Creditors.

### III. Subs. f. Final Meetings.

In General.

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## I. Subs. a, b, c. FIRST MEETINGS.

**Scope of Section.**—The cross-references, *supra*, indicate the limited scope of the section. It has to do only with the time and place of holding the first meeting of creditors, who shall preside, and what in general may be done thereat, the calling of special meetings by creditors, and when final meetings shall be held. It is clearly a section on practice, not law, a distinction recognized

in the English system by putting the corresponding rules of practice at the end of the section as a "schedule."<sup>1</sup> The procedure under § 55 is so different from that under the law of 1867,<sup>2</sup> as to make the cases and suggestions under that law of little value. It will be observed, however, that then the place and time of meeting could be arbitrarily fixed, and there were usually three stated meetings;<sup>3</sup> while, save for meetings called specially, there can now be but two.

**In General.**—On receipt from the clerk of an order of reference,<sup>4</sup> the referee forthwith calls a first meeting,<sup>5</sup> setting the time, "not less than ten nor more than thirty days after the adjudication," and the place "at the county seat of the county in which the bankrupt has had his principal place of business, resided or has his domicile." These provisions are, in effect, directory; for, by subsequent clauses, the time may be somewhat indefinitely lengthened, and, if, as is often the case, the county seat is "manifestly inconvenient as a place of meeting for the parties in interest," another place may be selected. The practice of keeping first meetings alive by successive continuances is general, and to be recommended;<sup>6</sup> it saves delay and expense in calling creditors together to consider special matters. Indeed, through the use of short notices addressed to and served on the creditors or attorneys who have appeared, it often alone makes prompt action possible. That all meetings should be held in courtrooms and on regular days and at regular hours,<sup>7</sup> and be conducted with dispatch, dignity and impartiality on the part of the presiding officer, in short, as a court of justice, seems to be the purpose of the statute.<sup>8</sup> Nor until there is a complete record of the proceeding will the estate be ordered closed.<sup>9</sup>

1. See Act of 1883; Schedule I.

2. Compare "Cross-references," ante.

3. Id.

4. § 18-f-g. See also, where the referee makes the adjudication, § 38 (1).

5. This is usually done by the entry of the fact in his record-book, though a formal order may be drawn

and signed. As to the method of giving notice, see § 58.

6. Compare *In re Norton*, Fed. Cas. 10,348; *In re Phelps*, Fed. Cas. 11,071.

7. *In re Eagles* 3 Am. B. R. 733, 99 Fed. 695.

8. Compare *In re Merchants' Ins. Co.*, Fed. Cas. 9,442.

9. See *In re Carr*, 8 Am. B. R. 635, 116 Fed. 556.

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 Subs. a-d.] Order of Business at Meetings; Special Meetings.
 

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**Order of Business.**—The referee, or, if there has been no reference, the judge, must preside at all first meetings. The following order of business is suggested:<sup>10</sup>

1. Call for and noting of appearances in person or by powers of attorney.

2. Application for *ex parte* amendments.

3. Allowance or disallowance of claims.

4. Election of trustee, and fixing of amount of bond.

5. Examination of the bankrupt.

6. Miscellaneous motions, orders and instruction.

7. Continuance to a place, day and hour certain.

This order will often be changed, as, where there has been a receiver,<sup>11</sup> who should report as soon as the creditors entitled to vote are ascertained, or where the appointment of appraisers<sup>12</sup> is necessary, an order of business which should follow the appointment of a trustee. Appearances may be either in person or by attorney; if the latter, by an attorney or counselor authorized to practice in the circuit or district court.<sup>13</sup> Where claims are objected to, they should, as far as possible, be heard summarily on an oral motion to reject—the mere filing usually amounts to an allowance<sup>14</sup>—and their right to vote determined. Only when clearly fictitious or preferential, should this right be denied them.<sup>15</sup> The determination of a referee as to the allowance or disallowance of a claim presented at such a meeting is a judicial act which cannot be reviewed, revised or reversed by a state court.<sup>15a</sup> Other general regulations as to papers and practice will be found in General Order IV. The cross-references, *ante*, to other sections and general orders, should be read in anticipation of a first meeting of creditors. The very broad range that business at meetings of creditors may take is indicated by subsection c.

## II. Subs. d, e. SPECIAL MEETINGS.

**In General.**—While this section provides only for first and final meetings in each case, special meetings can be called and held for a

10. See also 1 N. B. N. 112, 113; Rules 1, 5, 6, 8, 9.

11. Consult Section Two of this work.

12. See under Section Seventy.

13. General Order IV.

14. In re Sumner, 4 Am. B. R. 123, 101 Fed. 224. Claims so filed may, however, be objected to and allowance thus postponed. See § 57-d.

15. See Section Fifty-six.

15a. Clendenning v. Red River Val-

variety of purposes.<sup>16</sup> Indeed, if within the terms of § 58, it would seem that they must be held on the notice there specified. The phrase "special meeting" occurs only in General Order XXV. Special meetings are usually called to consider proposed sales of property, or the compromises of controversies, or for the declaration and payment of dividends.<sup>17</sup> Almost invariably the referee presides over such meetings, though this is not necessary, as at first meetings.<sup>18</sup>

**On Call of Creditors.**—Creditors' meetings, after the first, while always called by the referee, are usually the result of a report or a petition filed, or motion made, by the trustee. Subdivisions d and e provide a means to call the creditors together, if the trustee will not act, or the referee refuses to order the meeting. The former of these subsections seems, however, in conflict with § 58-a, and its value or validity has not yet been determined. The policy of the law seems to be to give all creditors the absolute right to ten days' notice of all important steps, nay, even of all "meetings of creditors."<sup>19</sup> The practice on the call of a creditors' meeting by written request of a majority in number and amount of claims proven is sufficiently explained in the statute.<sup>20</sup>

### III. Subs. f. FINAL MEETINGS.

**In General.**—Final meetings must be ordered when "the affairs of the estate are ready to be closed." This seems to imply that there need be no final meeting unless there is an estate. Where there are dividends for creditors a final meeting, as distinguished from a first meeting, must, since the proviso clauses added to § 65-b, be held. Creditors must also have the usual notice of the filing of a trustee's final account.<sup>21</sup> The safer practice is to hold such a final meeting even in no-asset cases. It should be called as soon as the trustee's final report is filed.<sup>22</sup>

ley Nat. Bank, 11 Am. B. R. 245 (N. Dak. Sup. Ct.).

16. See § 44; General Order XXV.

17. For a suggested practice, resulting in combining three or four special meetings in one, see under Section Fifty-eight, post.

18. Frequently, however, the trustee presides over meetings to consider the sale of property.

19. See § 58-a (3). Compare *In re Stoevers*, 5 Am. B. R. 250, 105 Fed.

355.

20. Subs. e.

21. § 58-a (6).

22. § 47-a (8). See also, for the necessity of a supplemental report of distribution by the trustee, sub nom. "Trustee's Supplemental Report" in Section Forty-seven of this work.



## SECTION FIFTY-SIX.

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### VOTERS AT MEETINGS OF CREDITORS.

§ 56. **Voters at Meetings of Creditors.**— *a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

*b* Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.

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**Analogous provisions:** In U. S.: *As to voters, generally*, Act of 1867, § 13, R. S., § 5034; *As to preferred creditors*, Act of 1867, § 18, R. S., § 3035.

In Eng.: *As to voters, generally*, Act of 1883, Schedule I, Rules 8–10, 14; *As to voting by proxy*, Act of 1883, Schedule I, Rules 15, 17, 19, 21; Act of 1890, § 22, General Rules 245–248.

**Cross references:** **To the law:** *As to who are creditors and secured creditors*, § 1 (9) (23); *As to meetings of creditors*, § 55; *As to provable debts*, § 63; *As to proof and allowance of claims*, § 57; *As to preferences*, § 60-a-b; *As to debts entitled to priority*, § 64-a-b.

**To the General Orders:** XXI.

**To the Forms:** Nos. 19, 20, 21, 22, 23.

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### SYNOPSIS OF SECTION.

#### I. Voters at Creditors' Meetings.

Comparative Legislation.

In General.

*Postponement of Allowance of Claims.*

*Election of Trustees.*

**I. Voters at Meetings of Creditors — Continued.**

Votes by Creditors.

*If Secured.*

*If Entitled to Priority.*

*If Preferred.*

Votes by Attorneys in Fact.

Practice.

**I. VOTERS AT CREDITORS' MEETINGS.**

**Comparative Legislation.**—The English statute regulates voting at creditors' meetings with great particularity,<sup>1</sup> and proxy voting at such meetings is so restricted as to make impossible many of the evils complained of under previous statutes. Valuable suggestions as to their orderly conduct will, therefore, be found in the English law and general rules. Our law of 1867 was not, in this particular, essentially different from that of 1898. Creditors then took action by a majority in number and amount, though all claims proven were counted, whether present or represented or not;<sup>2</sup> the voting of secured creditors was prohibited, not by statute, but by the courts.

**In General.**—The present law, in effect, gives voting power only to creditors holding claims neither preferred nor secured nor entitled to priority, which have been allowed and are present; and declares that a majority shall consist in the concurrence of the larger amount as to dollars and the larger number as to individuals. But a partnership creditor can be counted only as a single individual.<sup>3</sup> Nor is it necessary that there be any definite quorum, as in England; one creditor present or duly represented and entitled to vote may choose a trustee.<sup>4</sup> The meaning of "present" has been somewhat discussed. The better opinion is that, if excluded from voting for any reason, a creditor, though actually present, is not, for the purpose of ascertaining the total of claims, present.<sup>5</sup> But no creditor can vote until his claim has not only

1. See "Analogous Provisions," 669, 116 Fed. 547; In re Haynes, Fed. ante. Cas. 6,269.

2. § 13, R. S., § 5034.

3. In re Purvis, Fed. Cas. 11,476.

4. In re Mackellar, 8 Am. B. R.

5. In re Henschel, 7 Am. B. R. 662, 113 Fed. 443, reversing s. c., 6 Am. B. R. 25, and 6 Am. B. R. 305, 109 Fed. 861.

§ 56.]

Postponement of Allowance; Election of Trustees.

been "proved,"<sup>6</sup> which means the mere verification of it in accordance with the law and one of the forms prescribed by the Supreme Court, but also "allowed,"<sup>7</sup> which means the filing of such proved claim, without objection, with the proper referee. Even if filed, it seems that the referee has the right to determine its voting power, if the same is called in question.<sup>8</sup> The mere filing of objection will not, however, be sufficient to exclude a claim which, on an examination—often mere oral statements of counsel—seems to be *bona fide*; nor is "surprise," due to ignorance of the law or rules, sufficient to warrant a postponement.<sup>9</sup>

*Postponement of Allowance of Claims.*—If, however, a *prima facie* case is made out, and it appears that the vote of the claim objected to will be decisive of any matter submitted to the creditors, the referee should postpone the vote until the validity of the claim can be determined.<sup>10</sup> In such a case, it may even be necessary to appoint a receiver *ad interim*.<sup>11</sup>

*Election of Trustees.*—If possible, there should be no postponement of an election of trustee.<sup>12</sup> It should take place at the time and place fixed in the notice, and objections, technical in their nature, or motions manifestly for the purpose of delay, will usually be denied. It is to be regretted that the prevailing tendency is to construe the law and general orders technically.<sup>13</sup> A broad, perhaps, rather, a shrewd discretion seems a rule more in harmony with the purpose of the statute—that "the creditors of a bankrupt estate shall \* \* \* appoint" the trustee. In the nature

6. Compare § 57-a.

7. See § 57-b; In re Walker, 3 Am. B. R. 35, 96 Fed. 550; In re Eagles, 3 Am. B. R. 733, 99 Fed. 696.

8. Compare In re McGill, 5 Am. B. R. 155, 106 Fed. 57, affirming *Falter v. Rheinhart*, 4 Am. B. R. 782, 104 Fed. 292; In re Rekersdres, 5 Am. B. R. 811, 108 Fed. 206. See also In re Pfomm, Fed. Cas. 11,061; In re Dayville Wooley Co., 8 Am. B. R. 85, 114 Fed. 674; In re Malins, 8 Am. B. R. 205.

9. In re Kelly Dry Goods Co., 4 Am. B. R. 528, 102 Fed. 747. And compare In re Finlay, 3 Am. B. R. 738.

10. But see In re Henschel (in C. C. A.), ante. Consult also In re

Lake Superior, etc., Co., Fed. Cas. 7,997; In re Herrman, Fed. Cas. 6,425; In re Frank, Fed. Cas. 5,050; In re Eagles, supra. Postponement of proof was required under the former law (R. S., § 5083), but this is not so under the present statute. Compare also In re Jackson, Fed. Cas. 7,123.

11. § 2 (3) (15).

12. In re Richards, 4 Am. B. R. 631, 103 Fed. 849. See also In re Henschel, ante.

13. See foot-notes 29 and 30, post. Compare, however, In re Henschel (in C. C. A.), ante; also In re Sugenhimer, 1 Am. B. R. 425, 91 Fed. 744.

of things, all creditors who entitle themselves to vote before the result is announced, should be counted; conversely, no others should.<sup>14</sup> If there is a postponement, all claims proven in the interval have the same rights as those previously allowed. When, after the first meeting proper, amendments are granted bringing in new creditors, such creditors, it seems, may, if it appears that their votes would have changed the result, petition for a new election and, if successful thereat, oust the elected trustee.<sup>15</sup> The referee's power to approve or disapprove has already been considered.<sup>16</sup>

**Votes by Creditors.**—Creditors may appear and vote personally.<sup>17</sup> A member of a partnership or an officer of a corporation, presenting a proof of debt, should be allowed to vote, even though, if represented by an attorney, the power must show the latter's authority to act.<sup>18</sup> Creditors sometimes appear specially, as to assert title to goods sold on consignment, or to save their rights by having objections to the jurisdiction noted; but these are not creditors in the sense used in this section. That the creditors of a partnership, as distinguished from the creditors of an individual, are the only voters on matters involving the administration of partnership estates, seems to follow by analogy from § 5-b.<sup>19</sup>

*If Secured.*—Here § 57-e-h should be consulted; likewise § 1 (23).<sup>20</sup> The voting power of a secured debt depends on the value of the security.<sup>21</sup> This is often ascertained summarily; indeed, is sometimes stipulated. Again, technicalities should be avoided. At the same time, the burden clearly rests on the secured creditor to show that the security is not sufficient to pay his debt. Such a creditor cannot be counted or allowed to vote, unless it appears that there will be a deficiency, and then only to the amount of the deficit. Secured creditors often consider their security of so little value that they surrender it, or offer so to do, in their proof of debt. If so, they vote on the entire amount.<sup>22</sup>

14. In re Lake Superior, etc., Co., ante.

15. In re Perry, Fed. Cas. 10,998; In re Ratcliffe, Fed. Cas. 11,578; In re Morgenthal, Fed. Cas. 9,813.

16. See pp. 354, 355, ante. Compare also generally Sections Forty-four and Fifty-five.

17. General Order IV.

18. Compare In re Finlay, ante.

19. See also In re Beck, 6 Am. B. R. 554, 110 Fed. 140.

20. In re Coe, 1 Am. B. R. 275.

21. § 57-e. Compare also In re Cram, Fed. Cas. 3,343; In re Davis, Fed. Cas. 3,614; In re Hanna, Fed. Cas. 6,027. And see In re Hunt, Fed. Cas. 6,884.

22. See In re Parkes, Fed. Cas. 10,754; In re High, Fed. Cas. 6,473.

§ 56.1 If Entitled to Priority, etc.; Votes by Attorneys.

*If Entitled to Priority.*—The preceding paragraph is equally applicable here. Section 64-a-b should also be read. As priority creditors may reasonably expect to be paid in full, instances where they may participate in votes at creditors' meetings will be rare.

*If Preferred.*—A preferred creditor cannot prove his debt without surrendering his preference.<sup>23</sup> He is not even a creditor in the sense here used until he surrenders his advantage. When he does so voluntarily,<sup>24</sup> he is entitled to vote the full amount of his claim. In this connection, the changes in the definition of "preference" made by the amendatory act of 1903 should be observed.<sup>25</sup> Whether the obtaining of a lien through legal proceedings,<sup>26</sup> within four months of the bankruptcy, constitutes the creditor obtaining it a "preferred creditor" may be doubted.<sup>27</sup> It is not, however, important in this connection; the claims of such creditors can be objected to and postponed.

**Votes by Attorneys in Fact.**—The law permits proxy voting, provided the agent, attorney, or proxy is "duly authorized."<sup>28</sup> The meaning of these last words seems to be indicated by General Order XXI (5), as supplemented by Forms Nos. 20 and 21.<sup>29</sup> It has been held that attorneys may not vote claims unless duly authorized by a power of attorney in the form prescribed,<sup>30</sup> also that, where the attorney represents a partnership or corporation, the power must be accompanied by the oath called for by General Order XXI (5).<sup>31</sup> Perhaps caution requires this. But these rulings seem not to have given proper force to the words "when a creditor is not represented by attorney-at-law,"<sup>32</sup> in the caption of Form No. 20, or the second sentence of General Order IV. It is suggested, therefore, that letters of attorney need be filed only

23. § 57-g. For a case where a preferred creditor was improperly allowed to vote, see *In re Malino*, 8 Am. B. R. 205.

24. See under Section Fifty-seven.

25. See Section Sixty, post.

26. See Section Sixty-seven of this work.

27. § 57-d.

28. § 1 (9).

29. Powers must be executed as indicated in the forms, *In re Henschel*, 7 Am. B. R. 662, 113 Fed. 443. Com-

pare, for rulings, under former law, *In re Christley*, Fed. Cas. 2,702; *In re Barrett*, Fed. Cas. 1,043.

30. *In re Blankfein*, 3 Am. B. R. 165, 97 Fed. 191; *In re Richards*, 4 Am. B. R. 631, 103 Fed. 849; *In re Scully*, 5 Am. B. R. 716, 108 Fed. 372; *In re Lazoris*, 10 Am. B. R. 31, 120 Fed. 716.

31. *In re Finlay*, 3 Am. B. R. 738.

32. Form No. 26, under the former law, was not so captioned. Consult *In re Gasser*, 5 Am. B. R. 32.

by agents or proxies; and that attorneys "authorized to practice in the circuit or district court" in which the proceeding is pending may represent claimants without a power of attorney.<sup>33</sup> The cases under the former law are *contra*,<sup>34</sup> as is also a majority of those under the present statute.<sup>35</sup> But, unless there is strong reason—and, save in the large cities where perhaps disbarment means little, there seems to be none—the ancient practice of recognizing for all purposes an attorney who appears for a party should be followed. Written appearances should, however, be required.<sup>36</sup>

**Practice.**—This is indicated in what goes before. Claims are called for allowance at the first meeting, and should be at every continuance day. At the same time, appearances, either in person, by attorneys, or by agents or proxies, should be noted. If any power of attorney or proof of debt is objected to, the referee will often determine the question summarily. Sometimes such matters are postponed until all other claims are called, to determine whether the objections will affect the result. Votes are usually taken *viva voce*,<sup>37</sup> and, at the conclusion, the result announced by the referee, he at the same time noting in his minute-book the vote taken and the subject decided.<sup>38</sup> After this is done, other votes cannot be received, nor should a creditor be allowed to change his vote.<sup>39</sup> Referees usually have filing and approval stamps, which, when imprinted on the proofs or powers, indicate the action taken. There are, of course, slight variances in practice in every referee district. Any method which will permit an expression of the wishes of all creditors entitled to vote, without suggestion from or interference by the presiding referee, is all that is required. The effect of a disagreement of creditors on an election of trustee is considered elsewhere.<sup>40</sup>

33. In re Brown, 2 N. B. N. Rep. 590. Compare also In re Pauly, 2 Am. B. R. 333.

34. In re Purvis, ante; In re Kneopfel, Fed. Cas. 7,891; Martin v. Walker, Fed. Cas. 9,170.

35. See foot-note 30, ante.

36. Compare, for practice in accordance with these views, 1 N. B. N. 113 (rule 6), and p. 116, Form A. See also In re Gasser, ante, and

In re Northern Iron Co., Fed. Cas. 10,322.

37. Compare In re Pearson, Fed. Cas. 10,878.

38. The use of Form No. 22 is not general.

39. In re Scheiffer, Fed. Cas. 12,445; In re Lake Superior, etc., Co., ante.

40. See Section Forty-four.

## SECTION FIFTY-SEVEN.

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### PROOF AND ALLOWANCE OF CLAIMS.

§ 57. **Proof and Allowance of Claims.**— *a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so, what securities are held therefor, and whether any, and, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

*b* Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

*c* Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred.

*d* Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

*e* Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

*f* Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimant will permit.

*g* The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom convey-

*ances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given,\* shall not be allowed unless such creditors shall surrender<sup>1</sup> such preferences, conveyances, transfers, assignments, or incumbrances.\**

*h* The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

*i* Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

*j* Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

*k* Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

*l* Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof if rejected only in part.

*m* The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

1. Here the word "such" was substituted for the word "their" by the amendatory act of 1903.

\*Amendments of 1903 in italics.



§ 57.]

Analogous Provisions; Synopsis of Section.

*n* Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: *Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

**Analogous provisions:** In U. S.: *As to who may make proof*, Act of 1867, § 22, R. S., § 5078; Act of 1841, § 5; *and take proof*, Act of 1867, § 22, R. S., § 5079; Act of 1841, § 5; *As to manner of proof*, Act of 1867, § 22, R. S., § 5077; Act of 1841, §§ 5, 7; *As to inspection and allowance of claims*, Act of 1867, § 22, R. S., §§ 5080, 5081; Act of 1841, §§ 5, 7; Act of 1800, §§ 16, 37, 39; *As to postponing allowance of claims objected to*, Act of 1867, § 23, R. S., § 5083; *As to proof of preference claims*, Act of 1867, § 23, R. S., § 5084.

In Eng.: Act of 1883, Schedule II, General Rules 219-231.

**Cross references:** To the law: *As to provable debts*, § 63; *priority claims*, § 64; *preference claims*, § 60-a-b; *secured creditors*, § 1 (23); *As to meetings of creditors*, § 55; *As to offset and counterclaim*, §§ 60-c; 68; *As to co-debtors*, § 16.

To the General Orders: XX, XXI, XXIV, XXVIII.

To the Forms: Nos. 19, 20, 21, 31, 32, 33, 34, 35, 36, 37, 38, 39.

## SYNOPSIS OF SECTION.

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Comparative Legislation.

Claims, how Proven.

Additional Requirements of General Order XXI and the Forms.

*Before Whom Taken.*

*By Whom Made.*

*Against Whom Made.*

*How Proven, if Assigned.*

*How Proven, if Evidenced by a Written Instrument.*

*Statements, Transcripts of Judgments, etc., Attached.*

*Amendment of Proofs of Debt.*

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## II. Subs. e, g, h, i, j. Proving Secured, Priority, Preference, Etc., Claims.

### Secured Claims.

*Ascertaining Value of Securities.*

*Effect of Proving Secured Debt as Unsecured.*

### Priority Claims.

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*Payment of Notes Discounted at a Bank.*

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*Meaning of the Amendments.*

*Amendments in Actual Practice.*

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*What is a Surrender.*

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### Subrogation Claims.

### Penalty and Forfeiture Claims.

## III. Subs. f, k, l. Contests on Claims.

*By Objection before Allowance.*

*Practice on Petitions to Reconsider and Reject.*

*Recovery of Dividends in Such Cases.*

## IV. Subs. n. Time Limitation on the Allowance of Claims.

*In General.*

### I. Subs. a, b, c, d, m. PROOF AND ALLOWANCE OF CLAIMS.

**Comparative Legislation.**—The English bankruptcy law goes into great detail on this branch of the subject.<sup>2</sup> Its practice on proving debts is not essentially different from our own, and will, therefore, be found suggestive. So also of our law of 1867. The facts necessarily shown in a proof of debt were more numerous<sup>3</sup> and, early in its administration, the taking of proofs was limited to certain federal officers;<sup>4</sup> but then, as now, proof was made by an affidavit in the nature of a deposition,<sup>5</sup> and the general orders<sup>6</sup> and forms<sup>7</sup> were practically identical with those now in use. Precedents under that law are still valuable.

**Claims, how Proven.**—Claims in bankruptcy must be proven in the manner prescribed in the bankruptcy law, as supplemented by

<sup>2</sup>. See "Analogous Provisions," supra.

<sup>3</sup>. § 22, R. S., § 5077.

<sup>4</sup>. § 22, R. S., §§ 5076, 5079. See also R. S., §§ 5076A, 5076B.

<sup>5</sup>. Compare *In re Strauss*, Fed. Cas. 13,532; *In re Elder*, Fed. Cas.

4,326; *In re Port Huron Dry Dock Co.*, Fed. Cas. 11,293; *Dutton v. Freeman*, Fed. Cas. 4,210.

<sup>6</sup>. Act of 1867, General Order XXXIV.

<sup>7</sup>. Act of 1867, Forms Nos. 21, 22, 23, 24, 25.

## Subs. a, b, c, d, m.] Additional Requirements of General Order and Forms.

the general orders and forms. Affidavits used in insolvency or general assignment proceedings under state laws are not enough; though, where the facts and amounts tally with the schedule and include those called for by § 57-a, they will, provided there is no objection, usually be accepted and filed. Proofs of debt must show at least (1) the claim; (2) the consideration therefor;<sup>7a</sup> (3) whether any, and, if so, what, securities are held thereto; (4) whether any, and, if so, what, payments have been made thereon; and (5) that the sum claimed is justly owing from the bankrupt to the creditor.<sup>8</sup> They must be (a) in writing, (b) under oath, and (c) signed by the creditor. A claim so proven should be received and filed by a referee receiving it, and amounts to a *prima facie* case;<sup>9</sup> thus, unless objected to or continued for consideration, proving the debt for all purposes in the proceeding. The statement of the claim should be itemized and set forth the dates of the several items where possible.<sup>9a</sup> If objection be made the claim must be established by a fair preponderance of evidence, sufficient to enable the officer passing upon it to judicially declare as to its validity.<sup>9b</sup> The proof presented to sustain the claim should conform to the statement, at least as to amount and grounds.<sup>9c</sup> Other requirements, as where the claim is evidenced by a written instrument or has been assigned since bankruptcy, are considered later.

**Additional Requirements of General Order XXI and the Forms.—**

Strict practice requires, however, that proofs of debt conform to General Order XXI (1) (2) (3), and the Forms. Thus, proofs (1) should be entitled in the court and in the cause; (2) should contain a clause to the effect that "no note has been received for such account, nor any judgment rendered thereon;" (3) if on open ac-

7a. In re Stevens, 5 Am. B. R. 806, 107 Fed. 243, holding that the statement of consideration should be sufficiently specific and full to enable creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim, and if it be so meagre and general in character as not to do this it is insufficient. See also In re Brett, 12 Am. B. R. 492, 130 Fed. 981.

8. These facts are essential.

9. In re Sumner, 4 Am. B. R. 123, 101 Fed. 224; In re Shaw, 6 Am. B.

R. 499, 109 Fed. 780. But where not so proven until after the bankrupt's death, the proof does not have this effect. In re Shaw, 7 Am. B. R. 458, 112 Fed. 947.

9a. In re Wooten, 9 Am. B. R. 247, 118 Fed. 670. See In re Ferguson, 11 Am. B. R. 371, 127 Fed. 407.

9b. In re Blue Ridge Packing Co., 11 Am. B. R. 36, 125 Fed. 319; In re Scott, 1 Am. B. R. 553, 93 Fed. 418.

9c. In re Lansaw, 9 Am. B. R. 167, 118 Fed. 365.

count, should state when the debt became or will become due, and (4) if on items maturing at different dates, the average date should be stated.<sup>10</sup> If made (a) by a partnership, it must appear by oath that the affiant is a member of the partnership; if (b) by agent, the reason why it is not made by the claimant must be stated; and if (c) on behalf of a corporation, it must be sworn to by the treasurer, or, if none, the corresponding fiscal officer of such corporation.<sup>11</sup> Other requirements under this General Order are mentioned later. The forms prescribed are: (1) for an unsecured debt (No. 31); (2) for a secured debt (No. 32); (3) for a debt due a corporation (No. 33); (4) for a debt due a partnership (No. 34); (5) for proof by agent or attorney (No. 35); (6) for proof of secured debt by agent (No. 36). Blanks are not supplied by the government, but are on sale in law-book or stationery stores. Each of them contains an allegation which is not required by the law;<sup>12</sup> none of them contains the allegation to the effect that the claimant has no note or judgment.<sup>13</sup> When none of these forms fit a given case, they should be varied or combined, reference being had chiefly to the requirements of the statute as to what constitutes a proof of debt. Some of these variations are considered later. Illustrative cases will be found in the foot-note.<sup>14</sup>

*Before Whom Taken.*—Proofs of debt can be taken before any of the officers designated in § 20 of the act.<sup>15</sup> This is a marked change from the law of 1867. They are not now usually taken before the referee. There being no requirement to that effect, the mere signature of the officer, without a certificate as to his authority or even a seal, seems enough,<sup>16</sup> though referees can perhaps by rule require a certificate as evidence that the officer is “authorized to administer oaths.” The proof being in the nature of a deposi-

10. General Order XXI (1). See *In re Shaw*, ante; *In re Stevens*, 5 Am. B. R. 806, 107 Fed. 243.

11. *Id.*

12. That relative to set-offs and counterclaims.

13. Required by General Order XXI (1).

14. *In re Ankeny*, 1 N. B. N. 511; *In re Scott*, 1 Am. B. R. 553, 93 Fed. 418; *In re Wise*, 2 N. B. N. Rep. 151; *In re Stevens*, 5 Am. B. R. 11, 104 Fed. 325; *In re Sumner*, ante;

15. See pp. 245-247, ante. See also *In re Sugenhimer*, 1 Am. B. R. 425, 91 Fed. 744.

16. Not so under the law of 1867. *In re Nebe*, Fed. Cas. 10,073. See also, for instances of the strict practice under the former law, *In re Haley*, Fed. Cas. 5,918; *In re Strauss*, ante; *In re Lynch*, Fed. Cas. 8,635.

## Subs. a, b, c, d, m.] Assigned Claims; Evidenced by Written Instrument.

tion and, if objected to, amounting to a pleading also, claims should not be sworn to before the attorney for the bankrupt.<sup>17</sup>

*By Whom Made.*—Claims must be made by the creditor, which includes his duly authorized agent, attorney, or proxy;<sup>18</sup> and the method of proof where the claimant is a partnership, a corporation, or if made by agent, attorney, or proxy, is indicated above.<sup>19</sup>

*Against Whom Made.*—This question becomes sometimes important when a copartnership is bankrupt and the creditor holds obligations against it and its members.<sup>20</sup>

*How Proven, if Assigned.*—Here General Order XXI (3) controls. The requirement that the referee give immediate notice to the original creditor, and the ten-day limit on the filing of objections by such creditor, should be noted. Claims assigned before the bankruptcy, as well as those assigned after but before proof, must be supported by the deposition of the owner at the time of the bankruptcy;<sup>21</sup> if he is also the claimant, the ordinary proof of debt would seem enough.<sup>22</sup> The failure of a wife to register an assignment to her of a claim against her husband, as her separate property, under a state statute, does not preclude her from proving the claim against his estate.<sup>22a</sup>

*How Proven, if Evidenced by a Written Instrument.*—This is regulated by subsection b. If founded on a note or bond, or written contract, the original instrument must be attached to the proof of debt; otherwise, it will not be allowed.<sup>23</sup> When the claim is allowed, the written evidence may be withdrawn, upon leaving a copy in its place. Where it is lost or destroyed, it may still be proven by a

17. In re Keyser, Fed. Cas. 7,748; from the present as to when proof In re Nebe, supra. could be made by an agent.

18. See § 1 (9).

19. For illustrative cases under the present law, see In re Gerson, 5 Am. B. R. 850; In re Nieman, 6 Am. B. R. 329; In re Ervin, 6 Am. B. R. 356, 109 Fed. 135, as affirmed by Wallerstein v. Ervin, 7 Am. B. R. 256; In re Clark, 7 Am. B. R. 96, 111 Fed. 893; under the former law, In re Barnes, Fed. Cas. 1,012; Ex parte Norwood, Fed. Cas. 10,364; In re Whyte, Fed. Cas. 17,606; In re Watrous, Fed. Cas. 17,270; In re Ford, Fed. Cas. 4,932; In re South Boston Iron Co., Fed. Cas. 13,183; but the former law differed materially

20. See under Section Sixty-three, post. Compare also "Subrogation Claims" in this Section. Consult also Wallerstein v. Ervin, supra.

21. If sufficient to estop him from making the same claim, it will be enough. In re Miner, 8 Am. B. R. 248, 114 Fed. 998.

22. Ex parte Davenport, Fed. Cas. 3,586. See also In re Mills, Fed. Cas. 9,612; In re Pease, Fed. Cas. 10,880.

22a. In re Miner, 9 Am. B. R. 100, 117 Fed. 953.

23. Compare In re McCauley, 2 N. B. N. Rep. 1085.

proper affidavit.<sup>24</sup> The practice of attaching both original note and copy to the proof of debt, and requesting the referee to return the former, is usual.

*Statements, Transcripts of Judgments, etc., Attached.*—The practice of attaching statements of accounts to claims is general and should be followed. Likewise, a transcript of judgment should be annexed as an exhibit when the claim rests on a judgment; the proof, itself, should, however, show the consideration of the debt so in judgment.<sup>25</sup>

*Amendment of Proofs of Debt.*—The referee will usually allow such amendments to proofs of debt as justice requires, and claims objected to are often expunged or allowed to be withdrawn, with leave to amend and refile. Thus a claim filed within the required time may be amended, even after the lapse of a year, for the purpose of supplying the oath of the creditor and a statement that no payments have been made upon the amount claimed, in conformity with the law.<sup>25a</sup> But an amendment amounting to the presentment of a new claim will not be allowed after a year has elapsed.<sup>26</sup> Illustrative cases under the present and former law will be found in the footnote.<sup>27</sup>

*Claims by One Bankruptcy Estate against Another.*—Here subdivision m regulates. Without it, the trustee of the creditor estate would have power to prove. The court could compel him to file the additional deposition if necessary.<sup>28</sup>

<sup>24</sup>. Form No. 37. See also *In re Emison*, Fed. Cas. 4,459.

<sup>25</sup>. *In re Elder*, Fed. Cas. 4,326. For the impeachment of judgments proven in bankruptcy, see under Section Sixty-three of this work.

<sup>25a</sup>. *In re Roeber*, 11 Am. B. R. 464 (C. C. A.), 127 Fed. 122; *Hutchinson v. Otis*, 10 Am. B. R. 135, 190 U. S. 552, affirming 8 Am. B. R. 382, 115 Fed. 937, in which case it was held that clause n, of this section, cannot be taken to exclude an amendment to a claim already filed, admittedly defective, more than a year after adjudication, where the claim upon which the original proof was made is the same as that ultimately proved.

<sup>26</sup>. *Hutchinson v. Otis*, 8 Am. B.

R. 382, 115 Fed. 937; affirmed, 10 Am. B. R. 135, 190 U. S. 552; *In re McCallum*, 11 Am. B. R. 447, 127 Fed. 768. But see also *In re Moebius*, 8 Am. B. R. 590, 116 Fed. 47.

<sup>27</sup>. *In re Friedman*, 1 Am. B. R. 510; *In re Smith*, 2 Am. B. R. 648; *In re Myers*, 3 Am. B. R. 760, 99 Fed. 691; *In re Wilder*, 3 Am. B. R. 761, 101 Fed. 104; *In re Stevens*, 5 Am. B. R. 806, 107 Fed. 243; *In re Montgomery*, Fed. Cas. 9,729; *In re McConnell*, Fed. Cas. 8,712; *In re Myrick*, Fed. Cas. 10,000; *In re Parkes*, Fed. Cas. 10,754; *In re Jaycox*, Fed. Cas. 7,242; *In re New Brunswick Carpet Co.*, 4 Fed. 514.

<sup>28</sup>. Compare *In re Smith*, 1 Am. B. R. 37.

Subs. a, b, c, d, m.] Filing and Allowance; Effect.

**Filing and Allowance.**—Proofs of debt should be filed with the referee. If with the clerk of the district court, it becomes his duty to transmit them to the referee.<sup>29</sup> So also of claims filed with the trustee.<sup>30</sup> Proofs on receipt are usually stamped with a filing stamp, showing the day and hour received, but are not allowed until called at a meeting of creditors. The distinction between "proof" and "allowance" is much the same as that between "evidence" and "judgment."<sup>31</sup> On the call of claims duly proved and filed, an objection can be made, but only "by parties in interest," or, for cause, consideration can be continued by the court on its own motion. In either event, an appropriate entry should be made by the referee on the filing face of the claim or in his minute-book. In some districts, it is the custom to dispatch business by noting an oral objection, with the proviso that it shall be reduced to writing and filed within ten days, or the claim stand allowed. Claims when allowed should be stamped to that effect and entered in the referee's record-book. The practice on motions to reconsider and reject or reduce is explained in a later paragraph.<sup>32</sup> The right to a review of the referee's decision is generally recognized; but the decision below is in effect that of a court of first instance and on questions of fact the judge will not disturb it, unless clearly erroneous.<sup>33</sup> The right to and practice on appeal from the judge's decision is considered under Section Twenty-five.

**Effect of Proof and Allowance.**—Under the former law, a creditor who proved his claim could not proceed thereon in another court.<sup>34</sup> This is not the law now. He can proceed, though he will usually be halted by a stay.<sup>35</sup> He becomes, however, a party to the bankruptcy proceeding, with all that that condition implies.<sup>36</sup> If his claim, voluntarily filed, is disallowed it is a bar to a suit against the bankrupt on the same cause of action in another jurisdiction.<sup>36a</sup> How far a proof of debt that is not affected by a discharge amounts to a

29. General Order XX.

30. General Order XXI (1).

31. Compare *In re Wise*, 2 N. B. N. Rep. 151. See *In re Merrick*, Fed. Cas. 9,463.

32. Subs. d. See p. 422, post.

33. *In re Wood*, 2 Am. B. R. 695, 95 Fed. 946; *In re Rider*, 3 Am. B. R. 192, 96 Fed. 811. See also *In re Clark*, 7 Am. B. R. 96, 111 Fed. 893.

34. Act of 1867, § 21; *In re Meyers*, Fed. Cas. 9,518; *Cook v. Coyle*, 113 Mass. 252.

35. See pp. 131-139, ante.

36. *Wiswall v. Campbell*, 93 U. S. 347. Compare *In re Jones*, Fed. Cas. 7,447.

36a. *Hargardine, etc., Co. v. Hudson*, 10 Am. B. R. 225, 122 Fed. 232, affirming 6 Am. B. R. 657.

waiver has not yet been much discussed under the present law. Under former laws, proving such a debt did not estop the creditor from asserting it against after-acquired property.<sup>37</sup>

**What are, and What are not, Provable Debts.**— This is considered in detail under Section Sixty-three.

## II. Subs. e, g, h, i, j. SECURED, PRIORITY, PREFERENCE, ETC., CLAIMS.

**Secured Claims.**—Secured claims must be proven on one of the forms provided for that purpose.<sup>38</sup> That "secured creditor" has a limited meaning in bankruptcy should always be remembered.<sup>39</sup> A secured creditor may surrender his security or not as he chooses.<sup>40</sup> If he does, it inures to the benefit of all creditors, and his claim, if otherwise unobjectionable, is allowed at the full amount. If he does not, he can, it seems, have his claim allowed temporarily to enable him to participate in creditors' meetings prior to the determination of the value of his security, but only for such sum as seems to be owing over the security. He may retain his security and prove for the amount of his claim after deducting therefrom the value of his security.<sup>41</sup> As has already been explained, the value of securities is often arrived at summarily at first meetings to permit a creditor to vote the unsecured balance. A claimant may, of course, be fully secured.<sup>41a</sup> If so, he should not be allowed to file a proof, and does not become a party to the proceeding.<sup>42</sup> A creditor by proving an

<sup>37</sup>. In *re Robinson*, Fed. Cas. 11,939; In *re Clews*, Fed. Cas. 2,891; *McBean v. Fox*, 1 Ill. App. 177. The opposite was true under the law of 1841. *Chapman v. Forsyth*, 2 How. 202. See also *Clay v. Smith*, 3 Pet. 411.

<sup>38</sup>. Forms Nos. 32 and 36.

<sup>39</sup>. In effect, no creditor is secured in bankruptcy unless there is a lien held by him or accruing to his benefit on the property of the bankrupt. § 1 (23). Thus see *Swarts v. Bank*, 8 Am. B. R. 673, 117 Fed. 1.

<sup>40</sup>. See sub nom. "What is a Surrender" in this Section, post.

<sup>41</sup>. *Kohout v. Chaloupka*, 11 Am. B. R. 265 (Neb. Sup. Ct.); In *re Goldsmith*, 9 Am. B. R. 419, 118 Fed.

763. Compare In *re Little*, 6 Am. B. R. 681, 110 Fed. 621.

<sup>41a</sup>. *Matter of Kenney*, 10 Am. B. R. 452, holding that where a claim offered in proof is fully secured it should be disallowed.

<sup>42</sup>. Illustrative cases on secured claims under the present law are: In *re Frick*, 1 Am. B. R. 719; In *re Headley*, 3 Am. B. R. 272, 97 Fed. 765; In *re Browne*, 5 Am. B. R. 220, 104 Fed. 762; In *re Rhoads*, 2 N. B. N. Rep. 178; In *re Spring*, 2 N. B. N. Rep. 509. Under the law of 1867, *Yeatman v. New Orleans*, etc., 95 U. S. 764; In *re Sauthoff*, Fed. Cas. 12,379; In *re Cram*, Fed. Cas. 3,343; In *re Dunkerson*, Fed. Cas. 4,157; In *re Anderson*, Fed. Cas. 350; In *re*



Subs. e, g, h, i, j.]

Priority Claims.

unsecured claim is not barred from proving the amount of a secured claim less the sum realized on the security.<sup>42a</sup> Where a debt is secured by a life insurance policy the value of the policy should be deducted therefrom and the balance may be proved against the estate.<sup>42b</sup> A creditor whose claim is secured or partly paid by an accommodation indorser may prove the claim to its full amount, and exclude from the bankrupt estate the avails of such security or part payment.<sup>42c</sup>

*Ascertaining Value of Securities.*—This must be done in one of the methods indicated in subsection h. That by agreement, arbitration, or compromise between the creditor and the trustee is suggested as more satisfactory and time-saving. If by action in a state court, the trustee should intervene and see that the security brings what it is fairly worth.<sup>43</sup> Section Six relating to exemptions does not limit the provisions of subsection h, so as to authorize a creditor to prove his entire claim and to receive dividends thereon from the estate, where such claim is secured by a mortgage on exempt property.<sup>43a</sup>

*Effect of Proving Secured Debt as Unsecured.*—The law here was well settled prior to the present statute. If a secured creditor proves his debt as unsecured, he thereby waives his security.<sup>44</sup> This rule yields, however, where such a proof was made by one ignorant of his legal rights and without fraudulent intent.<sup>45</sup>

**Priority Claims.**—The present law yokes priority claims with secured claims, both as to manner of proof and the ascertainment of the value of the priority. A landlord's claim for rent, constituted a lien by state statute, must be proved to protect the landlord's right to priority of payment.<sup>45a</sup> It is thought that what is said of secured claims, *ante*, applies equally to debts entitled to priority.

Jaycox, Fed. Cas. 7,240; In re Newland, Fed. Cas. 10,170.

<sup>42a</sup> In re Ball, 10 Am. B. R. 564, 123 Fed. 164.

<sup>42b</sup> In re Busby, 10 Am. B. R. 650, 124 Fed. 469.

<sup>42c</sup> In re Noyes Bros., 11 Am. B. R. 506 (C. C. A.), 127 Fed. 286.

<sup>43</sup> See under Sections Eleven and Forty-seven; also In re Buse, Fed. Cas. 2,221; In re Stewart, Fed. Cas. 13,418.

<sup>43a</sup> In re Lautzenheimer, 10 Am. B. R. 720, 124 Fed. 716.

<sup>44</sup> Ex parte Morris, Fed. Cas. 9,823; In re Bear, 5 Fed. 53. See also Cook v. Farrington, 104 Mass. 212.

<sup>45</sup> In re Brand, Fed. Cas. 1,809; In re Harwood, Fed. Cas. 6,185; In re Parkes, Fed. Cas. 10,754; In re Baxter, 12 Fed. 72.

<sup>45a</sup> In re Hayward, 12 Am. B. R. 264, 130 Fed. 720.

**Preference Claims.**—Subsection g has been as much discussed as any clause in the present law. The former statute denied allowance to a claim filed by a creditor who accepted a preference “having reasonable cause to believe that the same was made or given by a debtor contrary to any provisions of the act;” nor could any dividend be paid on such a debt until the creditor surrendered his advantage.<sup>46</sup> The words quoted do not appear in the present act. Further, the definition of “preference” was, by a shifting of clauses while the bill was in committee, so changed as to lead to the ruling that any payment by debtor to creditor, after, though without knowledge of, actual insolvency, was a preference, even though lacking intent and made years before. This question is discussed at length elsewhere.<sup>47</sup> A few of the more valuable cases on the now historic controversy will be found in the foot-note.<sup>48</sup> *Pirie v. Chicago Title & Trust Co.*<sup>49</sup> settled the matter. After it, all payments subsequent to insolvency were preferences, the surrender which was required before the claim of a creditor so “preferred” could be allowed. A further effect of that decision was to declare in substance that all of the indebtedness of the bankrupt to a particular creditor, existing during the period of insolvency, was to be treated as one claim, and any payment made and received, even in good faith, by both parties during such period was to be treated as a preference, and must be surrendered before the balance of the claim, or any part of it, could be allowed.<sup>49a</sup> Under the act before the amendment of 1903 it was frequently held that a creditor was not required to surrender a payment made on an open account where, at the time of such payment or subsequent thereto, the creditor extended new credits to the bankrupt in excess of the amount of such payment, the net result of the entire transaction being to increase the indebtedness to the creditor,

46. § 23, R. S., § 5084. Compare *In re Kingsbury*, Fed. Cas. 7,816; *In re Walton*, Fed. Cas. 17,130; *In re Forsyth*, Fed. Cas. 4,948; *In re Currier*, Fed. Cas. 3,492.

47. See under Section Sixty, post.

48. Declaring payments in due course preferences: *In re Knost*, 2 Am. B. R. 471; *In re Conhaim*, 3 Am. B. R. 249, 97 Fed. 923; *Columbus Elec. Co. v. Worden*, 3 Am. B. R. 634, 99 Fed. 400; *In re Fixen*, 4 Am. B. R. 10, 102 Fed. 295. Contra, *In re*

*Piper*, 2 N. B. N. Rep. 8; *In re Smoke*, 4 Am. B. R. 434, 104 Fed. 289; *In re Hall*, 4 Am. B. R. 671. Apparently contra, even since *Pirie v. Chicago Title & Trust Co.*, *In re Dickson*, 7 Am. B. R. 186, 111 Fed. 726.

49. 182 U. S. 438, 5 Am. B. R. 814.

49a. *In re Dellings*, 10 Am. B. R. 688, 124 Fed. 852. Contra, *In re Wolf*, 10 Am. B. R. 153, 122 Fed. 127, holding that the case of *Pirie v. Trust Co.* did not apply to a payment in full of a separate and independent debt.

## Subs. e, g, h, i, j.] Payment of Notes Discounted at a Bank.

and the value of the bankrupt estate being enhanced to a like amount.<sup>49b</sup> Where payments were made upon an indebtedness during the period of four months prior to the debtor's bankruptcy, and notes were given for the balance, such notes cannot be proved as independent debts without a surrender of such payment.<sup>49c</sup>

*Payment of Notes Discounted at a Bank.*—The payment of notes given to third parties and discounted by a bank is a preferential payment to the bank and not to the payees of the notes, and must be surrendered before the bank can prove its claim for other indebtedness of the bankrupt.<sup>49d</sup> In determining the preferences to be surrendered by the bank, the increase of the contingent indebtedness of the bankrupt on the indorsement of notes given to it by customers and discounted by the bank should not be considered, since it cannot be said that such increased indebtedness resulted in a corresponding increase of the bankrupt's estate.<sup>49e</sup>

*The Amendments of 1903.*—The conditions resulting from this new doctrine—a reversal of the settled policy of all bankruptcy laws to protect transactions in due course even up to the moment of bankruptcy<sup>50</sup>—were so unsatisfactory to business men and disastrous to the credit system, that the demand for remedial legislation became practically unanimous. Congress has responded by amendments (1) making it certain that no transaction more than four months before the bankruptcy is a preference,<sup>51</sup> and (2) limiting that which must be surrendered as a condition precedent to proving a debt to (a) preferences that are “voidable under section sixty, subdivision b,” and (b) advantages possessed by creditors “to

49b. *Matter of Sagor*, 9 Am. B. R. 361 (C. C. A.), 121 Fed. 658; *Gaus v. Ellison*, 8 Am. B. R. 153 (C. C. A.), 114 Fed. 734; *Kimball v. Rosenham Co.*, 7 Am. B. R. 718 (C. C. A.), 114 Fed. 85; *Peterson v. Nash*, 7 Am. B. R. 181 (C. C. A.), 112 Fed. 311; *In re Dickson*, 7 Am. B. R. 186 (C. C. A.), 111 Fed. 726. These cases were cited and apparently approved in the case of *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 73. See also *Yaple v. Dahl-Millaken Grocery Co.*, 193 U. S. 526, 11 Am. B. R. 596.

49c. *Dunn v. Gaus*, 12 Am. B. R. 316 (C. C. A.), 129 Fed. 750; *In re Thompson*, 10 Am. B. R. 288, 121 Fed.

607; arising under the act before the amendment of 1903.

49d. *Bartholow v. Bean*, 18 Wall. (U. S.) 635; *In re Hill & Co.*, 12 Am. B. R. 221 (C. C. A.), 130 Fed. 315; *In re Thompson*, 10 Am. B. R. 288, 121 Fed. 607; *Swartz v. Fourth Nat. Bank*, 8 Am. B. R. 673, 117 Fed. 1; *In re Waterbury Furniture Co.*, 8 Am. B. R. 79, 114 Fed. 225.

49e. *In re Hill & Co.*, 12 Am. B. R. 221 (C. C. A.), 130 Fed. 315.

50. See English Act of 1883, § 49. See also historical review in *In re Hall*, supra.

51. This change is considered in detail under Section Sixty.

whom conveyances, transfers, assignments, or incumbrances, void or voidable under Section Sixty-seven, subdivision e, have been made or given."

*Meaning of the Amendments.*—Considered broadly, subsection g seems now to mean what the "protected transactions" clauses of the English system have meant for nearly two centuries. He who has obtained an advantage over other creditors, in any of the ways indicated in the present law, and only such an one, must hereafter surrender his advantage before his claim can be filed or allowed. That man would be rash, indeed, who attempted to predict the ultimate construction of subsection g by the courts. The intention of its framers is expressed in the sentence next before the last.<sup>52</sup> There may be some question, for instance, about the necessity of surrendering where the advantage consists in a lien through legal proceedings within the preference period, such a lien not being strictly either a conveyance, transfer, or assignment, or even an incumbrance in the common meaning of the word. The intention to require the surrender of such an advantage is nevertheless clear; nor is it doubted that the words of the law accomplish it. The discrepancies between a preference which is an act of bankruptcy<sup>53</sup> and one that is even now merely voidable may also cause discussion. Again, the intention is clear. If not voidable under § 60-b, a preference need not be surrendered; reasonable cause to believe a preference intended must appear; an intention to prefer need not. Cases under the former law are not in point, save remotely, and are, therefore, not cited. Still, whatever be the ultimate decisions as to transactions less common or more subject to suspicion, the exasperating practice of requiring the surrender of mere payments, made and received in due course, is at an end. The Ray bill, by the use of the words "section seventy, subdivision

<sup>52</sup>. The intention of Congress is indicated by the following from the analysis accompanying the House revision of the amendatory bill.

"*Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, having held that § 60-a is a definition of 'preference,' it necessarily follows that payments and other bona fide transactions after actual insolvency, though in due course of trade and without knowledge or reasonable cause to believe

that a preference was intended, must be, under § 57-g, surrendered before a creditor who received such a payment could prove the balance of his debt. This was not what was intended by the framers of the law. There is a very urgent and widespread demand for such an amendment as will obviate this menace to trade."

<sup>53</sup>. Compare § 3-a (2) with § 60-a-b.

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Subs. e, g, h, i, j.] Amendments in Actual Practice.

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e," would have compelled the surrender of all transfers made voidable by the state, but not by the bankruptcy law. The Senate struck these words out. This change makes for consistency. Only those who profit by bankruptcy frauds, *i. e.*, those within the four months, should be compelled to disgorge.

*Amendments in Actual Practice.*—The effect of this change in § 57-g will be to limit objections to the allowance of claims on the ground of preference to such transactions as are void or voidable under § 60-b or § 67-e. Only creditors whose transactions have been entirely in due course will be apt to offer proofs for allowance. This objection will, therefore, not often be made. If it is—as to prevent voting for trustee—it must usually be heard and decided somewhat summarily. The action of the creditor in surrendering or not will often turn on the decision. Whether, if he does not surrender after the point is raised, he can thereafter prove his debt is a question, though not by any means the same question as that discussed in the next paragraph but one; it is thought that, even after a refusal, the creditor can surrender at any time before a suit is brought.<sup>54</sup> For time when this amendment went into effect, see "Supplementary Section to Amendatory Act," *post*.

*Cases Still Valuable.*—The amendments just considered have rendered many cases decided under the law of 1898 no longer applicable, and they will not be cited. Some cases are nevertheless still of value. Those bearing on (1) what is a preference, and (2) whether a credit granted in good faith after the commission of a preference may be set off against the preference in determining the amount to be surrendered, will be found elsewhere.<sup>55</sup> That until surrender a creditor has not a provable debt and may not be a petitioning creditor in an involuntary case is still the law.<sup>56</sup> So also, it seems, is the doctrine that where the principal creditor cannot prove without surrendering, a guarantor cannot.<sup>57</sup> Likewise, the rule that creditors who cannot prove without surrendering their advantage on a particular debt, cannot prove other and detached debts not so tainted,<sup>58</sup> also that it is immaterial whether the creditor

54. Compare cases under "What is a Surrender," *post*.

55. See under Section Sixty of this work.

56. In re Rogers, 4 Am. B. R. 540, 102 Fed. 687.

57. In re Schmechel Co., 4 Am. B. R. 719, 104 Fed. 64.

58. In re Teslow, 4 Am. B. R. 757, 104 Fed. 229; In re Conhaim, 3 Am. B. R. 249, 97 Fed. 923. Contra, under the former law, In re Arnold, Fed.

is entitled to priority or not.<sup>59</sup> The difference between a mere preference and a voidable preference, discussed in some of the cases,<sup>60</sup> now becomes important; the former need not be surrendered.<sup>61</sup>

*What is a Surrender.*—Here the doctrines declared under the law of 1867 seem at least somewhat applicable. The phrasing of that statute undoubtedly colored some of the decisions under it. But, under well-recognized principles of law, a surrender that is compulsory is not a surrender. The element of fraud is usually present, but may be lacking; the test is: was the act a voluntary one? Each case turns on its own facts and there is some conflict, but the weight of decision under the present law supports this view.<sup>62</sup> Under the former law, there were no authoritative decisions. They varied from the rigid rule that, if a suit was brought to recover, it was too late,<sup>63</sup> to the rather watery doctrine that, even after judgment adverse, the recusant creditor was entitled to time to reflect and decide whether he would pay costs and yield, or continue recusant.<sup>64</sup> The former rule, though seeming more arbitrary, will in the long run prove more just; it pro-rates equity. He who knows that he has an advantage, but compels the trustee even to start proceedings to prove it, in effect from that time ceases to be a creditor, and, having exercised his election, should not thereafter, especially after judgment has gone against him, be permitted in the proceeding.<sup>65</sup>

Cas. 551; In re Richter, Fed. Cas. 11,803. But see In re Barnes, Fed. Cas. 1,013.

59. In re Bashline, 6 Am. B. R. 194, 109 Fed. 965; In re Proctor, 6 Am. B. R. 660; In re Read, 7 Am. B. R. 111.

60. Compare, for instance, In re Hall, ante. For a case where bona fides was the test, see In re Wyly, 8 Am. B. R. 604, 116 Fed. 38. And compare In re Bullock, 8 Am. B. R. 646, 116 Fed. 667.

61. Cases where transactions thought preferences under the former law were held not so, are the following: In re Stevens, Fed. Cas. 13,391; In re Horton, Fed. Cas. 6,707; In re Independent Ins. Co., Fed. Cas. 7,019. The elements of "preference" under that law were so different from those under the present

law as amended, as to render these and similar cases valuable only as suggestions, not as precedents.

62. In re Greth, 7 Am. B. R. 598, 112 Fed. 978; In re Owings, 6 Am. B. R. 454, 109 Fed. 623; In re Keller, 6 Am. B. R. 351, 109 Fed. 131; In re Beiber, 2 N. B. N. Rep. 943. Contra, In re Baker, 2 N. B. N. Rep. 105.

63. In re Lee, Fed. Cas. 8,179. Compare Phelps v. Sterns, Fed. Cas. 11,080.

64. Zahm v. Fry, Fed. Cas. 18,198; Hood v. Karper, Fed. Cas. 6,664.

65. Other suggestive cases under the former law are: In re Currier, Fed. Cas. 3,492; In re Tonken, Fed. Cas. 14,094; Burr v. Hopkins, Fed. Cas. 2,192; In re Comstock, Fed. Cas. 3,079. See also Vol. 6, Cent. Dig., "Bankruptcy," § 409.

Subs. e, g, h, i, j.]

Subrogation Claims.

*Cross-References.*—The practitioner should keep in mind the close connection between subsection g, as amended, and §§ 60-b and 67-e.

**Subrogation Claims.**—A surety or indorser or other person secondarily liable for the bankrupt may prove the principal creditor's debt, but only when the principal creditor could prove and does not.<sup>66</sup> The proving party simply has the same relief he would have had if the principal creditor had proved his claim. It is the fixed liability of the bankrupt to the creditor which is to be proved, not the contingent liability of the bankrupt to the surety.<sup>66a</sup> The surety proves not his contingent claim, but the claim of the creditor, and he must prove it in the creditor's name. This right to prove arises, not from the original contract, but from the equities of the subsequent transactions.<sup>67</sup> Since the right to prove exists primarily in the principal creditor, the surety cannot, after discharging part of the debt, be subrogated *pro tanto* and prove to that extent against the estate.<sup>68</sup> It is clear that if the principal creditor does not prove the debt, the surety is not released by the bankrupt's discharge.<sup>69</sup> Where preferential payments have been made by a bankrupt to the holder of notes to be applied thereon, and an indorser subsequently pays the balance due on such notes, he is subrogated to the rights of the holder *cum onere*, and can only prove such notes and participate in the distribution of the bankrupt's estate when he restores the preferential payments.<sup>69a</sup> Additional

66. Swartz v. Siegel, 8 Am. B. R. 689, 117 Fed. 13; In re Nickerson, 8 Am. B. R. 707, 116 Fed. 1003.

66a. Insley v. Garside, 10 Am. B. R. 52 (C. C. A.), 121 Fed. 699, citing Collier on Bankruptcy (3d ed.), p. 383.

67. In re Bingham, 2 Am. B. R. 223, 94 Fed. 796. See also Courier, etc., Co. v. Schaefer-Meyer Co., 4 Am. B. R. 183, 101 Fed. 699; In re Schmechel, etc., Co., ante.

68. In re Heyman, 2 Am. B. R. 651, 95 Fed. 800, and cases cited.

69. National Bank v. Sawyer, 6 Am. B. R. 154; In re Perkins, Fed. Cas. 10,983. Compare Smith v. Wheeler, 5 Am. B. R. 46.

69a. Livingston v. Heineman, 10 Am. B. R. 39 (C. C. A.), 120 Fed.

786. The rule is thus stated in the case of In re Siegel-Hillman Dry Goods Co., 7 Am. B. R. 351, 111 Fed. 980: "An indorser, an accommodation maker, or a surety on the obligation of a bankrupt, is a creditor, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract, within four months before the filing of the petition for adjudication in bankruptcy, will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt, unless the amount is first returned to that estate." See also In re Lyon, 10 Am. B. R. 25, 121 Fed. 723; Swartz v. Siegel, 8 Am. B. R.

illustrative cases will be found in the foot-note.<sup>70</sup> General Order XXI (4) should also be read in connection with this subsection.

**Penalty and Forfeiture Claims.**—The purpose of subsection j is clear. The creditors at large are not to be mulcted “except to the amount of the pecuniary loss sustained,” interest and costs, because of debts owing the sovereign as a penalty or forfeiture. The general subject of debts due the State is considered elsewhere.<sup>71</sup>

### III. Subs. f, k, l. CONTESTS ON CLAIMS.

**By Objection before Allowance.**—This method has already been considered.<sup>72</sup> It results usually from objections stated at the time claims are called before the election of a trustee. The result is a trial, as of an issue in equity, the objections being the bill, the proof of debt the answer.<sup>73</sup> Aside from nomenclature and the form of the pleadings and order, a contest on a claim by this method does not differ from that considered in the next paragraph.

**Practice on Petitions to Reconsider and Reject.**—A claim once allowed can be re-examined and excluded in whole or in part. The practice is indicated in General Order XXI (6). The referee is the court of first instance; the register under the former law was obliged to certify such contests to the judge. If a claim is rejected, it must be “for cause,” and “before but not after the estate has been closed.” The application is by petition,<sup>74</sup> and when there is a trustee in existence can only be presented by him, and then only when demanded by the interests of all the creditors.<sup>75</sup> It must be made

689 (C. C. A.), 117 Fed. 13; *In re Scherzer*, 12 Am. B. R. 451, 130 Fed. 631.

70. *In re Dillon*, 4 Am. B. R. 63; *In re Christensen*, 2 N. B. N. Rep. 1094; *In re New*, 8 Am. B. R. 566, 116 Fed. 116; *Whithed v. Pillsbury*, Fed. Cas. 17,572. Compare also *Hayer v. Comstock*, 7 Am. B. R. 493, and *Philips v. Wheeler Shoe Co.*, 7 Am. B. R. 326, 112 Fed. 404; *Swarts v. Bank*, 8 Am. B. R. 673, 117 Fed. 1.

71. See under Sections Seventeen and Sixty-four.

72. See p. 413, ante. See also *In re Walton*, Fed. Cas. 17,128.

73. For a breach of promise case in bankruptcy, see *In re Crocker*, 8 Am. B. R. 188.

74. See form of petition and notice among the “Supplementary Forms,” post. As to a time limit on such petitions, see *In re Chambers*, 6 Am. B. R. 707. As to a petition against several creditors, see *In re Lyon*, 7 Am. B. R. 61.

75. *Matter of Lewensohn*, 9 Am. B. R. 368 (C. C. A.), 121 Fed. 538. Compare *In re Levy*, 7 Am. B. R. 56; *In re Howard*, 4 Am. B. R. 69, 100 Fed. 630.



Subs. f, k, l.] Petitions to Reconsider and Reject; Recovery of Dividends.

promptly or it will be denied because of *laches*.<sup>76</sup> The claimant is entitled to "due notice" by mail; the time is usually fixed by the referee. It is customary to notify the claimant's attorney of record also. The issue is made by the petition and the proof of debt, the burden being on the petitioner, at least to overcome the *prima facie* case made by the proof of debt.<sup>77</sup> Neither party is entitled to a jury.<sup>78</sup> The customary rules of evidence apply.<sup>79</sup> The practice on trials in equity should be followed.<sup>80</sup> The result is an order either (1) reallowing the claim, or (2) rejecting it, or (3) reducing or increasing it; if the claim is rejected, Form No. 39 should be used; if it is reduced, Form No. 38. The right of a party aggrieved by such an order to, and the practice on, a review, and the binding effect of the rulings below on questions of fact, are considered elsewhere,<sup>81</sup> likewise, the effect of proving judgments in other courts.<sup>82</sup> Costs, while often not allowed on such contests, are discretionary. Where it appears that either the claim or the contest was not in good faith, they will usually be given.<sup>83</sup> The referee is not entitled to extra compensation for hearing and deciding, but he can insist on reimbursement or indemnity for his expenses, as in the employment of a stenographer, and the like.<sup>84</sup> Illustrative cases under the present law, not already cited, will be found in the foot-note.<sup>85</sup>

**Recovery of Dividends in Such Cases.**— It is the trustee's duty to recover a dividend that has been paid, if a claim is rejected, or the proportional part, if it is reduced. The statute is silent as to how this should be done. The claimant being a party, it would seem possible to require him to repay as a part of the order rejecting or

76. In re Hamilton Furniture Co., 8 Am. B. R. 588, 116 Fed. 115. See also In re Keller, 6 Am. B. R. 334.

77. In re Doty, 5 Am. B. R. 58; In re Sumner, ante. Compare also In re Saunders, Fed. Cas. 12,371.

78. In re Christensen, 4 Am. B. R. 99, 101 Fed. 243; Barton v. Barbour, 104 U. S. 126.

79. See, in this connection, In re Kaldenberg, 5 Am. B. R. 6, 105 Fed. 232; In re Shaw, 6 Am. B. R. 499. Consult also In re Merrill, Fed. Cas. 9,466; In re Moore, Fed. Cas. 9,752; Canby v. McLearn, Fed. Cas. 2,378.

80. Compare the Equity Rules.

See also In re Keller, 6 Am. B. R. 334.

81. See p. 331, ante; also General Order XXVII.

82. Consult Section Sixty-three, post.

83. Compare In re Little River Lumber Co., 3 Am. B. R. 682, 101 Fed. 558; In re Troy Woolen Co., Fed. Cas. 14,203.

84. General Order X.

85. In re Headley, 3 Am. B. R. 272, 97 Fed. 765; In re Wise, 2 N. B. N. Rep. 250; In re Smith, 2 Am. B. R. 648.

reducing, and then, at the instance of the trustee, proceed in contempt if the claimant does not obey. In any event, the trustee can proceed by suit in the proper court.

#### IV. Subs. n. TIME LIMITATION ON THE ALLOWANCE OF CLAIMS.

**In General.**—Subsection n is new. It is in the nature of a limitation and is, therefore, construed strictly. Claims cannot be filed in bankruptcy after one year after the adjudication.<sup>86</sup> This requirement is in line with the policy of the statute to compel rapidity of administration. An exception seems to be made in favor of tax claims, which need not even be filed,<sup>87</sup> and where the administration was halted by an adjustment out of court, sufficient money being deposited to pay all claimants.<sup>88</sup> Whether the time limit applies to proofs in composition cases has been questioned.<sup>89</sup> It is thought that it does. Other exceptions are made by the words of the subsection, as where the claimant is an infant or insane.

A claim may be offered for proof after the expiration of the year where the delay in its presentation was caused by the fraud of the bankrupt in so preparing his schedules as to lead creditors to believe that there was practically no estate for distribution.<sup>90</sup> The statute was intended to affect the right of a tardy creditor to prove in competition with creditors who had been diligent, not the right of a bankrupt to prevent the payment of a creditor whose tardiness had been caused by the bankrupt's own fraud.<sup>91</sup> But it has been held that a strict construction of the section will not permit of the proof of a claim after the expiration of the year, although it be shown that the bankrupt had fraudulently concealed assets.<sup>92</sup> The fact that the

86. *In re Stein*, 1 Am. B. R. 662, 94 Fed. 124; *Bray v. Cobb*, 3 Am. B. R. 788, 100 Fed. 270; *In re Shaffer*, 4 Am. B. R. 728, 104 Fed. 982; *In re Rhodes*, 5 Am. B. R. 197, 105 Fed. 231; *In re Leibowitz*, 6 Am. B. R. 268. Note also *Hutchinson v. Otis*, 8 Am. B. R. 382, 115 Fed. 937; *In re Moebius*, 8 Am. B. R. 590, 116 Fed. 47; *In re Hawk*, 8 Am. B. R. 71, 114 Fed. 916.

87. *In re Cleanfast Hosiery Co.*, 4 Am. B. R. 702.

88. *In re Lockwood*, 4 Am. B. R. 731, 104 Fed. 794.

89. *In re Fox*, 6 Am. B. R. 525.

90. *In re Towne*, 10 Am. B. R. 284, 122 Fed. 313.

91. *In re Hawk*, 8 Am. B. R. 71 (C. C. A.), 114 Fed. 916; *In re Moebius*, 8 Am. B. R. 590, 116 Fed. 47; *In re Liebowitz*, 6 Am. B. R. 268, 108 Fed. 617; *In re Rhodes*, 5 Am. B. R. 197, 105 Fed. 231; *In re Shaffer*, 4 Am. B. R. 728, 104 Fed. 982; *Bray v. Cobb*, 3 Am. B. R. 78, 100 Fed. 270.

92. *Matter of Paine*, 11 Am. B. R. 351, 127 Fed. 246.

Subs. n.]

Time Limitation on Allowance.

creditor did not receive the required notice, and within the period of one year had no knowledge of the bankruptcy, does not authorize a proof of the claim after the expiration of such period.<sup>93</sup> As has already been noted,<sup>94</sup> a claim which is filed within the required time may be amended even after the expiration of a year.<sup>95</sup> But where the claim has been unconditionally withdrawn, a like claim, but for a different amount, cannot be filed after the expiration of the year, upon the theory that it is an amended claim.<sup>96</sup>

93. *In re Muskoka Lumber Co.*, 11 Am. B. R. 761, 127 Fed. 886. *Estes*, 12 Am. B. R. 182 (C. C. A.), 128 Fed. 584.

94. See ante, page 412.

95. *Hutchinson v. Otis*, 190 U. S. 552, 10 Am. B. R. 135; *Buckingham v.* 96. *In re Thompson*, 10 Am. B. R. 581, 123 Fed. 174.

## SECTION FIFTY-EIGHT.

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### NOTICE TO CREDITORS.

§ 58. **Notice to Creditors.**— *a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearing upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.

*b* Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

*c* All notices shall be given by the referee, unless otherwise ordered by the judge.

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**Analogous provisions: In U. S.:** *As to notices of first meeting*, Act of 1867, § 11, R. S., § 5019; *As to notice of filing trustee's account*, Act of 1867, § 28, R. S., § 5096; *As to notice of dividends*, Act of 1867, § 27, R. S., § 5102; Act of 1841, § 9; Act of 1800, § 29; *As to notice of application for discharge*, Act of 1867, § 29, R. S., § 5109; Act of 1841, § 4; *As to notice of application for confirmation of composition*, R. S., § 5103A; *As to notice of meetings in general*, Act of 1867, § 17, R. S., § 5094.

**In Eng.:** Generally to different sections, to Schedule I and the General Rules; there is no corresponding single section on notices in the English act.

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§ 58.] Cross-references; Synopsis of Section.

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**Cross references: To the law:** *As to examinations of the bankrupt*, §§ 7 (9); 21-a; *As to confirmations of compositions*, § 12-b; *As to discharges*, § 14-b; *As to sales*, § 70-b; *As to dividends*, § 65-b; *As to final accounts*, § 47-a (8); *As to final meetings*, § 55-f; *As to compromising controversies*, §§ 26, 27, 57-h; *As to dismissals of proceedings*, § 59-g; *As to publication*, § 28.

**To the General Orders:** IV, XVI, XVIII, XXI (2) (6).

**To the Forms:** Nos. 18, 24, 40, 41, 53, 57.

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SYNOPSIS OF SECTION.

**I. Subs. a. Notice to Creditors by Mail.**

**In General.**

**When Necessary.**

*Subd. (1). Of Examination of Bankrupt.*

*Subd. (2). Of Proposed Confirmation of Composition.*

*Subd. (2). Of Application for Discharge.*

*Subd. (4). Of Proposed Sales.*

*Subd. (5). Of Declaration and Payment of Dividends.*

*Subd. (6). Of Final Meetings.*

*Subd. (7). Of a Proposed Compromise of a Controversy.*

*Subd. (8). Of Proposed Dismissal of a Proceeding.*

*Subd. (3). Of Meetings Generally.*

**When Notice Not Necessary.**

**Combined Notices.**

**Effect of Notice on Jurisdiction.**

**II. Subs. b. Notice to Creditors by Publication.**

**When Necessary and When Not.**

**III. Subs. c. By Whom Notices are Given.**

**In General.**

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**I. Subs. a. NOTICES TO CREDITORS BY MAIL.**

**In General.**—The present statute requires a notice to creditors of every important step in a bankruptcy proceeding. Its predecessor was somewhat loose in this regard, notices being often discretionary, and the time and method subject to the direction of the court.<sup>1</sup> The present law, perhaps, goes too far the other way. Notices should not contain the names of the creditors or the amounts of their

1. See "Analogous Provisions," ante.

claims, as seems sometimes to have been the practice under the law of 1867. The forms for notice of the first meeting,<sup>2</sup> and of application for a discharge are prescribed.<sup>3</sup> The notice given must always be (1) by mail, (2) at least ten days before the day set for the meeting, and (3) addressed to the creditors at "their respective addresses as they appear in the list of creditors \* \* \* or as afterwards filed with the papers in the case." The last clause quoted seems to cover cases where a creditor's address is changed during the proceeding, or is found to have been incorrect in the schedules, as well as those where a creditor requires a referee to mail to a specified address.<sup>4</sup> Notices may, however, be waived. For the first meeting, the addresses given in the schedule should be used;<sup>5</sup> thereafter, those specified on the proof of debt, unless a request giving a specified address be filed as provided in General Order XXI (2). The various General Orders referred to in the Cross-References, *ante*, are in point chiefly on notices other than those strictly required by subsection a; so also of two of the Forms.<sup>6</sup> The cases under the former law will be found of little value.

**When Necessary.**—The mandatory phrasing of subsection a indicates that for all the proceedings there enumerated the ten-day notice by mail is absolutely essential.<sup>7</sup>

*Subd. (1). Of Examination of Bankrupt.*—This refers to an examination under § 7 (9); it may to one under § 21-a. But a bankrupt may be examined at any continuance of a meeting in the call of which his examination has been noticed, and, if present at any other meeting, he can, it is thought, be examined even without such a notice. If examined for the purpose of preparing schedules,<sup>8</sup> or on the hearing of his discharge, no notice to creditors seems to be required.<sup>9</sup>

*Subd. (2). Of Proposed Confirmation of Composition.*—Here consult § 12-b. While the usual notice must be given of an applica-

2. Form No. 18.

3. Form No. 57. Additional forms for other necessary notices will be found in "Supplementary Forms," post.

4. General Order XXI (2).

5. In re Schiller, 2 Am. B. R. 704, 96 Fed. 400; In re Dvorak, 6 Am. B. R. 66, 107 Fed. 76.

6. Forms Nos. 24 and 41.

7. In re Gilbert, 2 N. B. N. Rep. 378; In re Campbell, Fed. Cas. 2,348.

8. In re Franklin Syndicate, 4 Am. B. R. 511, 101 Fed. 402. See also In re Abrahamson, 1 Am. B. R. 44.

9. See, however, In re Price, 1 Am. B. R. 419, 91 Fed. 635.

tion for the confirmation of a composition,<sup>10</sup> it seems that a like notice is not required on an application to set it aside. Still, it is customary.<sup>11</sup>

*Subd. (2). Of Application for Discharge.*—The Supreme Court has, in Form No. 57, suggested a method which is both cumbersome and, in so far as it attempts to take from the district judge the power to fix the practice,<sup>12</sup> of doubtful force. Such a notice should take the form of a short show cause order, the original signed by the judge and attested by the clerk, the same to be mailed either by the clerk or by the referee, or the attorney in charge if so “ordered by the judge.” This practice is regulated by rules in the different districts,<sup>13</sup> and, in some, prior to the amendatory act of 1903, fees were charged for this service. Unless, however, there are district rules modifying it, the practice suggested by the Supreme Court should be followed. It seems that, on an application to revoke a discharge, any notice fixed by the court is sufficient.<sup>14</sup>

*Subd. (4). Of Proposed Sales.*—Here see § 70-b. The requirement that notice be given of every proposed sale of assets has proven an unfortunate restriction on discretion. The time necessary, substantially two weeks after application, often makes advantageous sales impossible. This difficulty doubtless led to General Order XVIII, under which most sales are now made. The word “perishable” has been construed with extreme liberality.<sup>15</sup> This is hardly necessary—that is, if General Order XVIII (2) is not in derogation of the statute—provided good cause can be shown for a private sale; at least, such a construction can fairly be put upon that General Order. However, when substantial loss will not result, the command of the statute should be obeyed. If notice of a proposed sale is given, it is often so phrased as also to give notice of a meeting of creditors to attend a public sale of the property immediately thereafter.<sup>16</sup>

10. This, however, usually takes the form of an order to show cause, entitled in the district court and issued by the clerk.

11. See under Section Thirteen, ante. Compare *In re Hamlin*, Fed. Cas. 5,993.

12. That is, as in derogation of § 58-c.

13. See, for instance, the practice

in the Northern District of New York, 1 N. B. N. 124.

14. Compare under Section Fifteen.

15. *In re Smith*, 1 N. B. N. 180; *Anon.*, 1 N. B. N. 204. Contra, *In re Beutel's Sons*, 7 Am. B. R. 768.

16. See “Combined Forms,” post, in this Section.

*Subd. (5). Of Declaration and Payment of Dividends.*—This seems to imply two meetings; indeed, since the amendatory act of 1903, two meetings are necessary.<sup>17</sup> Following the practice under the former law, the forms include one to be used by the trustee in instructing creditors to call for their dividends.<sup>18</sup> This form is archaic and rarely used, dividend checks being mailed direct with receipts attached, or so phrased as to amount to receipts when indorsed. It is a common practice, too, to combine in one notice (1) that for the declaration of dividends and (2) that for the payment of the dividends so declared.<sup>19</sup>

*Subd. (6). Of Final Meetings.*—Here §§ 47-a (8), 55-f, and 65-b should be consulted.<sup>20</sup> The notice is one of ten days, but the return day must be at least fifteen days after the filing of the trustee's final report and account. Such a meeting cannot now be held until three months after the first dividend.<sup>21</sup>

*Subd. (7). Of a Proposed Compromise of a Controversy.*—This refers to § 27; perhaps, at least by analogy, to § 26. No compromise can be made, no matter how advantageous, save on the statutory notice. The requirement is often met by combining such a notice with one for a meeting for general purposes.

*Subd. (8). Of Proposed Dismissal of a Proceeding.*—Clearly this refers to § 59-g, and the cases cited under Section Fifty-nine should be consulted. The practical difficulty of notifying creditors whose names and addresses are unknown, as in most involuntary cases before adjudication, is apparent. It, however, does not, it is thought, limit the mandatory effect of this provision.<sup>22</sup> The notice, if before a reference to the referee, should perhaps take the form of an order to show cause, and be served as above suggested of the like order in an application for discharge.<sup>23</sup>

*Subd. (3). Of Meetings Generally.*—In addition to the requirements as to notice of the different steps already mentioned, sub-

17. See § 65-b, as amended.

18. Form No. 17.

19. See "Supplementary Forms," post.

20. Compare *In re Stein*, 1 Am. B. R. 662, 94 Fed. 124, for the law before the amendatory act of 1903.

21. See under Section Sixty-five of this work.

22. For instance, see *Neustadter v. Chicago Dry Goods Co.*, 3 Am. B. R. 96, 96 Fed. 830. But see also *In re Jemison Mercantile Co.*, 7 Am. B. R. 588, 112 Fed. 966.

23. See p. 429, ante, and in the "Supplementary Forms," post.



Subs. a.]

When Notice Not Necessary.

section a also requires that the parties in interest shall have the statutory notice of "all meetings of creditors." This omnibus phrase seems to include every gathering to pass on matters that may be submitted to creditors. It does not, therefore, include meetings where the referee or judge acts independent of them. A first meeting or a special meeting to fill a vacancy in the office of trustee must, therefore, be regularly noticed.<sup>24</sup> Form No. 18 can be adapted to fit any general meeting of creditors. See also Forms Nos. 177, 178, and 179 in the "Supplementary Forms," *post*.

**When Notice Not Necessary.**—As already indicated, a notice is not necessary where the referee is the sole judge; unless, of course, required by subsection a. Neither is it essential, where, though similar to or the negative of a meeting of which notice is necessary, the statute does not specifically require it. Thus, a ten-day notice need not be given of the appointment of a special referee,<sup>25</sup> or of a receiver,<sup>26</sup> or of examinations before the first meeting,<sup>27</sup> or of a trial on a contested claim,<sup>28</sup> or of sales of perishable property,<sup>29</sup> or of the hearing of exceptions to the trustee's report on exemptions,<sup>30</sup> or of many other minor steps in a proceeding.<sup>31</sup> Indeed, no notice whatever need be given in some of them. Where possible, however, the ten-day notice by mail should always be given, unless otherwise prescribed by the General Orders or local rules. Such is the policy of the law.

**Combined Notices.**—Form No. 18, itself, is a combined notice—of the first meeting and of the examination of the bankrupt. It is possible also to notify creditors in one notice, say, of (1) a proposed compromise, (2) a proposed sale to be followed, without objection, by a public auction forthwith, (3) the declaration and (4) the payment of a final dividend, and (5) a final meeting to pass on the trustee's account.<sup>32</sup> Notices should be combined and meetings thus consolidated, where possible.

<sup>24</sup>. Not so of a "special meeting" called under General Order XXI (6); there the court fixes what is due notice. Compare *In re Stoeve*, 5 Am. B. R. 250, 105 Fed. 355.

<sup>25</sup>. *Bray v. Cobb*, 1 Am. B. R. 153, 91 Fed. 102.

<sup>26</sup>. *In re Abrahamson*, 1 Am. B. R. 44.

<sup>27</sup>. *Id*.

<sup>28</sup>. § 57-k.

<sup>29</sup>. General Order XVIII (3).

<sup>30</sup>. General Order XVII.

<sup>31</sup>. *In re Stotts*, 1 Am. B. R. 641, 93 Fed. 438.

<sup>32</sup>. For one of these notices, see "Supplementary Forms," *post*.

By Publication; By Whom Notices Given.

[§ 58.]

**Effect of Notice on Jurisdiction.**—The filing of the petition gives jurisdiction, both *in rem* and *in personam*.<sup>33</sup> Failure to receive the notice is, therefore, not an objection to the regularity of the proceeding.<sup>34</sup> The important fact under the present law is: was the debt duly scheduled.<sup>35</sup> If so, there seems to be jurisdiction of the creditor, even without notice. Illustrative cases under the former law will be found in the foot-note.<sup>36</sup>

## II. Subs. b. NOTICE TO CREDITORS BY PUBLICATION.

**When Necessary and When Not.**—Only the notice of the first meeting must be published. It should be so published at least once, and the last publication must be “at least one week prior to the date fixed for the meeting.” Publication must be in the official newspaper.<sup>37</sup> Whether other notices shall be published, depends either on the standing rules of the district or the order of the court in each case. It is customary on discharge applications and sales. Failure to publish, while not going to the jurisdiction, is probably so far an irregularity as to render void any meeting for which publication is necessary.<sup>38</sup> Proof of publication should be made by affidavit of the proprietor or foreman of the newspaper.<sup>39</sup>

## III. Subs. c. BY WHOM NOTICES ARE GIVEN.

**In General.**—Notices must be given by the referee, “unless otherwise ordered by the judge.” If by the former, the official business envelope can be used; perhaps if, under the order of the judge, actually mailed by another. Notices are sometimes printed on postal cards, sometimes on slips and inclosed in envelopes. If the referee mails the notice he is entitled to indemnity for his actual expense in so doing, but, especially since § 72 was added by the amendatory act, to no fee. No compensation thus being pos-

33. *Southern Loan & Trust Co. v. Benbow*, 3 Am. B. R. 9, 96 Fed. 514; *Rayl v. Lapham*, 27 Ohio St. 452.

34. *In re Stetson*, Fed. Cas. 13,381.

35. See § 17 (3).

36. *Thurmond v. Andrews*, 10 Bush (Ky.), 400; *Heard v. Arnold*, 56 Ga. 570; *Pattison v. Wilbur*, 10

R. I. 448; *In re Archenbrow*, Fed. Cas. 504.

37. § 28.

38. *In re Hall*, Fed. Cas. 5,922. See also *In re Bellamy*, Fed. Cas. 1,260; *Wiley v. Pavey*, 61 Ind. 457.

39. For form, see 1 N. B. N. 118. See also “Supplementary Forms,” post.

Subs. c.]

How Notices Given.

sible, the judge has often in the past "otherwise ordered," *i. e.*, he has, by standing rule, directed such notices to be mailed by the bankrupt or his attorney, and this practice will perhaps become general. In that case, proof must be made by affidavit and filed with the referee.<sup>40</sup> If the referee mails the notices, a certificate in his record-book that he mailed notices to all creditors at the addresses given in the schedules, or as afterwards filed with the papers in the case, is enough.

40. This practice is outlined in 1 N. B. N. 112, 113, 118.

## SECTION FIFTY-NINE.

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### WHO MAY FILE AND DISMISS PETITIONS.

§ 59. Who may File and Dismiss Petitions.— *a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

*b* Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

*c* Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

*d* If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

*e* In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

*f* Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

*g* A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

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§ 59.]                      Analogous Provisions; Synopsis of Section.

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**Analogous provisions: In U. S.:** *As to who may file voluntary petitions*, Act of 1867, § 11, R. S., § 5044; Act of 1841, § 7; *As to who may file involuntary petitions*, Act of 1867, § 39, R. S., § 5021; Act of 1841, § 1; Act of 1800, §§ 1, 2; *As to intervention by other creditors*, Act of 1867, R. S., § 5026.

**In Eng.:** Act of 1883, §§ 4, 5, 6, 7; General Rules 143 to 152.

**Cross references: To the law:** §§ 1 (9) (20) (23); 2 (1); 3; 4; 5; 18; 31; 32; 60; 63.

**To the General Orders:** III, V, VI, VII, IX, XI.

**To the Forms:** Nos. 1, 2, 3, 4, 5, 11.

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SYNOPSIS OF SECTION.

**I. Subs. a, b, c. Who May File Petitions.**

Comparative Legislation.

Scope of Section.

Who May File Voluntary Petitions.

Who May File Involuntary Petitions.

*Creditors Who Have Provable Claims.*

*But not Secured Creditors.*

*Nor Creditors Who Have Received Preferences.*

*Nor Creditors Who Have Attachments.*

*Nor Creditors Who Have an Advantage Through Fraud.*

Counting Creditors When but One Creditor Petitions.

Involuntary Petitions Must be in Duplicate.

**II. Subs. d. Practice if Answer Avers More Than Twelve Creditors.**

In General.

Practice.

**III. Subs. e. Exclusion of Certain Classes of Creditors.**

Employees and Relations.

**IV. Subs. f. Intervention by Other Creditors.**

In General.

Who May Intervene.

Practice.

**V. Subs. g. Dismissals of Petitions.**

Meaning and Practice.

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I. Subs. a, b, c. WHO MAY FILE PETITIONS.

**Comparative Legislation.**—In most of the continental countries, a single creditor, no matter what his debt, may petition. The

English law permits one creditor, as well as two or more, in not less than £50, to apply.<sup>1</sup> Our laws as to voluntary petitions are considered elsewhere.<sup>2</sup> As to involuntary, the law of 1800 permitted a petition "by any one creditor" in \$1,000, or two creditors in \$1,500, or three creditors in \$2,000; the law of 1841 allowed one creditor in \$500 to petition; while the law of 1867, which originally gave the right to one or more creditors in \$250, was, in 1874, so amended that it could be exercised only by one-fourth in number of the creditors the aggregate of whose provable debts amounted to one-third of all. The present act seems a compromise.<sup>3</sup>

**Scope of Section.**—This section has to do primarily with: (1) who may file petitions; and secondarily with: (2) the practice where an answer denies that the creditors are less in number than twelve, (3) the intervention of creditors other than the petitioning creditors, and (4) the dismissal of petitions other than on the merits. It should always be read in connection with § 18. Its limited scope and the other sections controlling on the frame of, the allegations in, the verification of, and the service of process under, involuntary petitions, are indicated elsewhere.

**Who May File Voluntary Petitions.**—This is discussed under Section Four. "Any qualified person" means, therefore, "any person who owes debts, except a corporation."

**Who May File Involuntary Petitions.**—Here the words of the subsection state one of the jurisdictional allegations of all involuntary petitions. Other necessary allegations are referred to elsewhere.<sup>4</sup> A bankruptcy petition cannot be filed other than by the debtor, save by (1) a creditor or creditors, (2) having provable claims, (3) aggregating, in excess of securities, \$500;<sup>5</sup> (4) if but one creditor petitions, he must aver that the alleged bankrupt has less than twelve creditors in all; otherwise, three creditors must join in the petition.<sup>6</sup> A creditor who was not such at the time of the commission of an alleged act of bankruptcy cannot petition his

1. Act of 1883, § 6 (1)-a.

2. See under Section Four of this work.

3. See "Analogous Provisions," supra.

4. See under Sections Two, Three, Four, Five and Eighteen.

5. Compare *In re Ryan*, 7 Am. B. R. 562, 114 Fed. 373.

6. *In re Brown*, 7 Am. B. R. 102, 111 Fed. 979.

Subs. a, b, c.]

Creditors Who Have Provable Claims.

debtor into bankruptcy.<sup>7</sup> This appears to be not only the conclusion of the courts upon well-considered cases, but a reasonable construction.<sup>7a</sup> It is unquestionably based upon the well-established principle that creditors cannot complain of a conveyance by the debtor made prior to the time they became creditors, unless such conveyance was made with the direct purpose of defeating their claim.<sup>7b</sup> He must be a creditor at the time the petition is filed, whether his debt is due or not.<sup>8</sup> So, also, a person may buy up claims to make the required amount;<sup>9</sup> the debtor may importune his creditors to proceed and the adjudication still be valid;<sup>10</sup> and, if a creditor solicits other creditors to join, the bankrupt may solicit them not to do so.<sup>11</sup> But a transaction devised and entered into for the purpose of preventing a petition by a single creditor by continuing the number of creditors at more than twelve has been held objectionable.<sup>11a</sup>

*Creditors Who Have Provable Claims.*—Whether the petitioning creditor's debt is provable or not is the important test. The meaning of "provable debts" is discussed in detail under Section Sixty-three. There are numerous cases under the present law where a creditor's petition has been attacked on this ground; these will be considered here. As to the person petitioning, it has been held that a wife may do so,<sup>12</sup> also where the petitioner is the only creditor and is such by virtue of a judgment for breach of promise,<sup>13</sup> and that, if also creditors, stockholders may petition against their corporation,<sup>14</sup> or a partner against his partnership, but not as mere stockholders or partners;<sup>15</sup> it is clear, too, that the creditors of a partnership may file against an individual partner.<sup>16</sup> A preponderance of authority is to the effect that an unliquidated claim, under

7. In re Callison, 12 Am. B. R. 344, 130 Fed. 987; affirmed, sub nom: Brake v. Callison, 11 Am. B. R. 797, 120 Fed. 201.

7a. In re Brinckmann, 4 Am. B. R. 551, 103 Fed. 65; Beers v. Hanlin, 3 Am. B. R. 745, 99 Fed. 695; In re Muller, Fed. Cas. No. 9,912; In re Burke, Fed. Cas. No. 2,156.

7b. Brake v. Callison, 11 Am. B. R. 797, 120 Fed. 201.

8. In re Alexander, Fed. Cas. 161; In re Ouimette, Fed. Cas. 10,622.

9. In re Woodford, Fed. Cas. 17,972; In re Shouse, Fed. Cas. 12,815.

10. In re Bouton, Fed. Cas. 1,706.

11. In re Brown, ante.

11a. Leighton v. Kennedy, 12 Am. B. R. 229 (C. C. A.), 129 Fed. 737.

12. In re Novak, 4 Am. B. R. 311, 101 Fed. 800.

13. In re Penzansky, 8 Am. B. R. 79.

14. In re Rollins, etc., Co., 2 N. B. N. Rep. 988.

15. See In re Schenkein & Coney, 7 Am. B. R. 162; affirmed on this point, 113 Fed. 421.

16. In re Mercur, 2 Am. B. R. 626, 95 Fed. 634.

the present law, not being yet "provable," will not sustain a petition.<sup>17</sup> Nor will a single claim collusively divided into three parts.<sup>18</sup> Whether a surety on a debt not due may file a petition is a question.<sup>19</sup> That an indorser can is not doubted, his claim being provable;<sup>20</sup> so also if the surety has, on default of his principal, assumed the latter's obligation.<sup>21</sup> The provability of such debts is considered elsewhere.<sup>22</sup> Where only two petitioning creditors have qualified, and six out of nine intervening creditors are of unquestioned competency, the proceeding will be sustained.<sup>22a</sup> Numerous cases under the former law will also be found in point.<sup>23</sup>

*But Not Secured Creditors.*—That is, if fully secured. This seems to have been otherwise under the former law, the petition being considered a waiver of the security.<sup>24</sup> But the intention under the present act is clear. A secured debt can be counted in dollars only to the amount unsecured; if there be no such amount, it should not be counted at all. There are no precedents as yet. It is doubtful, however, whether the doctrine of implied waiver will apply under the phrasing of the present law. If, on the other hand, the claim is not fully secured, it may sustain a petition, provided, when reckoned at the unsecured amount, the required aggregate of \$500 is reached.<sup>25</sup> The cases seemingly *contra*<sup>26</sup> under the former law are not in point, referring, as they do, to the number

17. *Beers v. Hanlin*, 3 Am. B. R. 745, 99 Fed. 695; *In re Brinkman*, 4 Am. B. R. 551, 103 Fed. 65; *In re Morales*, 5 Am. B. R. 425, 105 Fed. 761; *Phillips v. Dreher Shoe Co.*, 7 Am. B. R. 326, 112 Fed. 404. But see to the opposite effect *In re Grant Shoe Co.*, 11 Am. B. R. 48, 125 Fed. 576; *In re Big Meadows Gas Co.*, 7 Am. B. R. 697, 113 Fed. 974; *In re Manhattan Shoe Co.*, 7 Am. B. R. 408; affirmed as *In re Stern*, 8 Am. B. R. 569, 116 Fed. 604. And compare *In re Hilton*, 4 Am. B. R. 774, 104 Fed. 981.

18. *In re Independent Thread Co.*, 7 Am. B. R. 704, 113 Fed. 998.

19. *Phillips v. Dreher Shoe Co.*, *supra*.

20. *In re Gerson*, 5 Am. B. R. 89, 105 Fed. 891; affirmed, *s. c.*, 6 Am. B. R. 11.

21. *Boyce v. Guaranty Co.*, 7 Am. B. R. 6, 111 Fed. 138.

22. See under Section Sixty-three.

22a. *In re Vastbinder*, 11 Am. B. R. 118, 126 Fed. 417. See *In re Romanow*, 1 Am. B. R. 461, 92 Fed. 510.

23. *Michaels v. Post*, 21 Wall. 398; *Sloan v. Lewis*, 22 Wall. 150; *Linn v. Smith*, Fed. Cas. 8,375; *In re Alexander*, Fed. Cas. 161; *In re Western Savings, etc., Co.*, Fed. Cas. 17,442; *In re Nickodemus*, Fed. Cas. 10,254; *In re Chamberlin*, Fed. Cas. 2,580; *In re Matot*, Fed. Cas. 9,282; *In re Broich*, Fed. Cas. 1,921; *In re Noesen*, Fed. Cas. 10,288; *In re Cornwall*, Fed. Cas. 3,250.

24. *In re Stansell*, Fed. Cas. 13,293. Compare also *In re Bergeron*, Fed. Cas. 1,342; *In re Hatje*, Fed. Cas. 6,215.

25. See *In re Hazens*, Fed. Cas. 6,285.

26. *In re Frost*, Fed. Cas. 5,134; *In re Scrafford*, Fed. Cas. 12,556.



## Subs. a, b, c.] Nor Creditors Having Preferences or Attachments.

of the creditors, rather than the existence of a petitioning creditor's debt.

*Nor Creditors Who Have Received Preferences.*—Prior to the amendatory act of 1903, all partial payments after insolvency were preferences. Thus, the objection was often made to involuntary petitions that the creditors had not provable debts. That, in such cases, it was well taken is sustained by the authorities under both the former and the present law.<sup>27</sup> This doctrine is now applicable only where a preference is voidable under § 60-b. If a payment to a creditor was made more than four months prior to the date of the petition, it is not preferential, and does not disqualify him as a petitioning creditor.<sup>27a</sup> The use of the word "provable" has been thought to refer to the proof of a debt as distinguished from its allowance.<sup>28</sup> But all debts can be "proved" whether secured, or preferred, or fraudulent; they cannot be "allowed" unless the advantage is surrendered. "Provable" must, therefore, be here considered the equivalent of "allowable."<sup>28a</sup> The rule above stated does not apply where the creditor surrenders his preference. If so, he has a petitioning creditor's debt.<sup>28b</sup>

*Nor Creditors Who Have Attachments.*—Here the cases are also quite uniform,<sup>29</sup> though the question is not thought definitely settled. There is some doubt whether an attachment less than four

27. In re Rogers Milling Co., 4 Am. B. R. 540, 102 Fed. 687; In re Gillette, 5 Am. B. R. 119, 104 Fed. 769; In re Hunt, Fed. Cas. 6,882; In re Rado, Fed. Cas. 11,522; In re Israel, Fed. Cas. 7,111; Clinton v. Mayo, Fed. Cas. 2,899.

27a. In re Girard Glazed Kid Co., 12 Am. B. R. 295, 129 Fed. 841.

28. See In re Norcross, 1 Am. B. R. 644.

28a. Judge Ray, in the case of Matter of Hornstein, 10 Am. B. R. 308, 321, 122 Fed. 266, insists that equity demands that those creditors who have received a preference be allowed to file petitions even if they have not surrendered their preferences. He emphatically dissents from the remarks in the text and says: "That 'provable' as used in the Bankruptcy Act, is to be considered as the equivalent of 'allowable,' as used in the same act, is a contention that ought not to prevail. Those words

are not used in the act as equivalents, or as expressing the same meaning. Nor are the acts of or proceedings for 'proving a claim' and of 'allowing a claim,' the same." In the case of In re Herzikopf, 9 Am. B. R. 90, 118 Fed. 101, it is held that a creditor may be a petitioner in bankruptcy notwithstanding the receipt of a preference which is unsurrendered. Citing In re Norcross, 1 Am. B. R. 644; In re Cain, 2 Am. B. R. 378; In re Bloss, Fed. Cas. No. 1,562; In re California Pacific Ry. Co., Fed. Cas. 2,315; In re Stansell, Fed. Cas. No. 13,293; Rankin v. Railway Co., Fed. Cas. No. 11,567.

The statement in the text would seem, however, to be sustained by the cases of In re Gillette, 5 Am. B. R. 119; In re Fishplate Clothing Co., 11 Am. B. R. 204, 125 Fed. 986.

28b. In re Vastbinder, 11 Am. B. R. 118, 126 Fed. 417.

29. In re Burlington Malting Co.,

months old amounts to a "preference;"<sup>30</sup> it more nearly resembles a security. On broad principles of equity, however, it is an advantage, placing the creditor having it out of that class which alone can file an involuntary petition. Only after a surrender of it, or at least an offer to surrender, should he be allowed to file.<sup>30a</sup>

*Nor Creditors Who Have an Advantage Through Fraud.*—As has been seen, proofs of debt are not allowed if objection is made by a party in interest and that objection is sustained.<sup>31</sup> Thus, debts paid in part by a fraudulent transfer would probably be refused allowance. It is thought such claims will not sustain a creditor's petition, unless the petitioner surrenders his fraudulent advantage. It is already well settled that creditors who have participated in the act of bankruptcy complained of, as by becoming parties to a general assignment and accepting dividends thereon, cannot afterwards be petitioning creditors in bankruptcy; this, perhaps, on the doctrine of estoppel, rather than as participants.<sup>32</sup> So, creditors who have merely connived at a "fraud on the law,"<sup>33</sup> as well as those who have attempted or accomplished a fraud on the other creditors, cannot institute an involuntary proceeding. Neither class, it seems, comes into court with clean hands.

**Counting Creditors When But one Creditor Petitions.**—These equitable doctrines also apply where the sole question is the number of creditors in a given case. Only persons having provable debts<sup>34</sup> can be counted. This excludes those secured or preferred.

6 Am. B. R. 369, 109 Fed. 777; In re Schenkein, 113 Fed. 421, reversing on this point, s. c., 7 Am. B. R. 162.

30. Compare In re Schenkein, supra, with In re Hazens, and In re Broich, ante.

30a. In re Schenkein, 10 Am. B. R. 322, 113 Fed. 421; In re Burlington Malting Co., 6 Am. B. R. 369, 109 Fed. 777. Contra, Matter of Hornstein, 10 Am. B. R. 308, 122 Fed. 266.

31. See, generally, under Section Fifty-seven.

32. In re Romanow, 1 Am. B. R. 461, 92 Fed. 510; Simonson v. Sinsheimer, 95 Fed. 148; In re Miner, 4 Am. B. R. 710, 104 Fed. 520; Durham Paper Co. v. Seaboard Knitting Mill, 10 Am. B. R. 29, 121 Fed. 179; Clark

v. Heune & Meyer, 11 Am. B. R. 583 (C. C. A.), 127 Fed. 288; Lowenstein v. McShane Mfg. Co., 12 Am. B. R. 601; Moulton v. Coburn, 12 Am. B. R. 553, 131 Fed. 201. Compare, however, In re Curtis, 1 Am. B. R. 440, 91 Fed. 737. And see, for what acts do not constitute an estoppel, Simonson v. Sinsheimer, 96 Fed. 579, as affirmed by 3 Am. B. R. 824, 100 Fed. 426; In re Winston, 10 Am. B. R. 171, 122 Fed. 187; Perry v. Langley, Fed. Cas. 11,006; Spicer v. Ward, Fed. Cas. 13,241.

33. Consult In re Gutwillig, 1 Am. B. R. 388, 92 Fed. 337; West v. Lea, 174 U. S. 590, 2 Am. B. R. 463.

34. § 1 (9); note the exception of employees and laborers, discussed

Subs. d.]

More than Twelve Creditors.

The converse is true where the total of the indebtedness is at issue; then, all debts preferentially paid must be counted.<sup>35</sup> Were it not for these rules, a debtor might often successfully resist a petition by collusion with creditors whom he had preferred.<sup>36</sup> The number of creditors should be reckoned as of the date of the petition.<sup>36a</sup>

**Involuntary Petitions Must be in Duplicate.**—This means two petitions, each an original, not an original and a copy. The requirement is mandatory, and failure to observe it is a jurisdictional defect.<sup>37</sup> These papers must be filed with the clerk; handing them to him out of his office, while not usual, is enough.<sup>38</sup> The duplicate is served with the subpœna on the alleged bankrupt.

## II. Subs. d. PRACTICE IF ANSWER AVERS MORE THAN TWELVE CREDITORS.

**In General.**—Though the policy of the law is to require the concurrence of at least three creditors in a petition, subsection d, in connection with subsection f, in practice, results in petitions by one creditor in most cases where there is neither time nor opportunity to ascertain whether the alleged debtor has twelve or more. As a consequence, even if an answer alleging that number of creditors is interposed, the quota of three is easily supplied by intervenors, and a bankruptcy through one creditor in \$500 is nearly as easy as it was under the former law before the amendments of 1874. The allegation that the creditors are less than twelve can, nay, often must be, on information and belief, and, if so, is, it seems, sufficient.<sup>39</sup>

**Practice.**—The practice on such an answer is distinctly marked out in this subsection.<sup>40</sup> A practical difficulty arises where a refer-

later. Compare on this, *In re Barrett Co.*, 2 N. B. N. Rep. 80.

<sup>35.</sup> *In re Norcross*, ante; *In re Tirre*, 2 Am. B. R. 493, 95 Fed. 425. See also *In re Cain*, 2 Am. B. R. 378, and *In re Barrett Co.*, supra.

<sup>36.</sup> See cases cited under footnote 26.

<sup>36a.</sup> *In re Coburn*, 11 Am. B. R. 212, 126 Fed. 218; *Moulton v. Coburn*, 12 Am. B. R. 553, 131 Fed. 201.

<sup>37.</sup> *In re Dupree*, 97 Fed. 28; *In re Stevenson*, 2 Am. B. R. 66, 94 Fed. 110.

<sup>38.</sup> Compare under Section Eighteen.

<sup>39.</sup> *In re Scammon*, Fed. Cas. 12,427; *Perrin & Gaff Mfg. Co. v. Peale*, Fed. Cas. 10,981; *In re Mann*, Fed. Cas. 9,033.

<sup>40.</sup> That the list of creditors must be "under oath," compare *In re*

ence has been made to a special master. He is not "the court" and cannot, therefore, give the notice to the other creditors. This difficulty is usually met either by obtaining from the court an order directing him so to do, or by a stipulation of the parties. If other creditors "join in," they must do so in the court proper and not before the special master. Where such an answer raises other questions and other creditors do not intervene, the evidence should at first be confined to the single question of the number of creditors; the burden is on the alleged bankrupt. If the decision is with him, the petition must be dismissed. The words "such hearing" clearly refer to a trial of this issue only. Creditors may join in at any time before the evidence thereon is closed. The cases under the former law are often in point.<sup>41</sup>

### III. Subs. e. EXCLUSION OF CERTAIN CLASSES OF CREDITORS.

**Employees and Relations.**— While claimants who have an advantage in dollars are not excluded in ascertaining the number of creditors, those presumably in the control of the bankrupt are. The purpose — to prevent the creation of fictitious debts and thereby the number of creditors where less than twelve are alleged — is clear. But the subsection hardly goes far enough to prevent that evil. In line with its policy, it has been held that the officers of a bankrupt corporation, who are also its creditors, should be excluded.<sup>42</sup> This may be doubted. The subsection is by way of limitation and should be construed strictly. Only employees at the time of bankruptcy and relations by consanguinity or affinity within the third degree should be excluded. The statute is silent concerning whether, being so excluded, these classes may be petitioning or intervening creditors. It is thought that employees cannot, save as to that portion of their debts not entitled to priority, but that relatives otherwise qualified can.

### IV. Subs. f. INTERVENTION BY OTHER CREDITORS.

**In General.**— After the amendments of 1876, intervention by other creditors, under the previous law, was regulated by statute. The time, ten days, was rather short. There is no such limitation

Steinman, Fed. Cas. 13,357; In re Hymes, Fed. Cas. 6,986. See also Cas. 11,953; In re Sheffer, Fed. Cas. 12,742. Compare, for cases under the present law, foot-note 35.

41. Robinson v. Hanway, Fed.

42. In re Barrett Co., ante.

## Subs. f.]

## Who May Intervene.

in the present law. If the issue is the number of creditors, intervenors should apply before or during the hearing. If the issue is general, they should be permitted to join in, even after four months after the act of bankruptcy;<sup>43</sup> but a delay of a year has been thought unreasonable and permission to intervene refused.<sup>44</sup> No settlement that the petitioning creditors make can defeat the right.<sup>45</sup> If they abandon the case and others intervene and carry it on, the adjudication will operate on preferences within four months of the original filing.<sup>46</sup> In such a case, the intervening petitioners need not be three in number or have debts aggregating \$500.<sup>47</sup> But intervention will not be ordered where the original petition was on its face defective in number or amount;<sup>48</sup> nor will an amendment be allowed to an original petition which on its face shows that the claims of the petitioners are in the aggregate less than \$500, so as to join creditors with claims sufficient to make up the required amount.<sup>48a</sup> Nor is intervention to oppose a voluntary petition possible under the present law.<sup>49</sup>

**Who May Intervene.**—Generally speaking, any creditor who could have petitioned, may join in a petition. When an answer is filed, however, the rule seems different and may be expressed by substituting the words "party in interest" for "creditor." Thus, it is thought, any one who has a direct pecuniary interest in preventing the bankruptcy, even though that degree of good faith required of a petitioner in such a case is absent, may file an answer.<sup>50</sup>

43. In re Stein, 5 Am. B. R. 288, 105 Fed. 749; In re Mammoth Pine, etc., Co., 6 Am. B. R. 84, 109 Fed. 308; In re Mackey, 6 Am. B. R. 577, 110 Fed. 355.

44. In re Jemison Mercantile Co., 7 Am. B. R. 588, 112 Fed. 966. Compare also Citizens' Nat. Bank v. Cass, Fed. Cas. 2,732.

45. In re Calendar, Fed. Cas. 2,307; In re Buchanan, Fed. Cas. 2,073.

46. In re Lacey, Fed. Cas. 7,965.

47. In re Sheffer, ante. Consult, however, In re Ryan, 7 Am. B. R. 562, 114 Fed. 373.

48. In re Beddingfield, 2 Am. B. R. 355, 96 Fed. 190; Robinson v. Hanway, ante. Compare, however, In re Mercur, ante.

48a. In re Stein, 12 Am. B. R. 364, 130 Fed. 377; In re Ryan, 7 Am. B. R. 562, 114 Fed. 373; In re Mammoth Pine, etc., Co., 6 Am. B. R. 84, 109 Fed. 308; In re Beddingfield, 2 Am. B. R. 355, 96 Fed. 190.

49. In re Carleton, 8 Am. B. R. 270, 115 Fed. 246.

50. For illustrative cases, see In re Heusted, Fed. Cas. 6,440; In re Jack, Fed. Cas. 719; In re Hatje, ante; In re Mendelsohn, Fed. Cas. 9,420; In re Austin, Fed. Cas. 662; In re Jonas, Fed. Cas. 7,442; In re Vogel, Fed. Cas. 16,981. Contra, In re Boston, etc., Co., Fed. Cas. 1,679; and, under the law of 1841, Dutton v. Freeman, Fed. Cas. 4,210; In re Tallmadge, Fed. Cas. 13,738.

Thus it has been held that an attaching creditor may resist an involuntary petition without surrendering his attachment.<sup>50a</sup> The procedure after answer is considered elsewhere.<sup>51</sup>

**Practice.**—Whether creditors “join in the petition” or “file an answer,” they should enter an appearance.<sup>52</sup> This is usually enough. If the application is to “join in” the petition, it may be by a verified petition, and is usually heard *ex parte*. If granted, the applicant becomes as much a petitioning creditor as if he had joined in the original petition.<sup>53</sup> Whether a new act of bankruptcy can be alleged in such a petition is doubted. If such act was committed more than four months before, though within four months of the filing of the original petition, it certainly should not be.<sup>54</sup> In any event, a petition which thus changes the issue should not be made, save on notice to all parties. The better practice is to amend the original petition,<sup>55</sup> after the order of intervention is granted. All parties to the proceeding should be notified of the entry of the order; this is usually done by the intervenor’s attorney. Professional courtesy suggests that such notice be accompanied by copies of the petition and order, if any. Any party to the proceeding may respond that the intervenor is not a creditor;<sup>56</sup> otherwise, a reply is usually unnecessary. If the order has been granted, such a response can be brought upon motion to vacate or an order to show cause. Notice should be given all parties who have appeared.

#### V. Subs. g. DISMISSALS OF PETITIONS.

**Meaning and Practice.**—A petitioning creditor cannot withdraw<sup>57</sup> and thus reduce the number to less than three. A proceeding once begun must result either in an adjudication or a dismissal. This subsection has to do only with dismissals, other than on the merits. Its close connection with § 58-a (8) should be noted; also a practical difficulty previously mentioned.<sup>58</sup> It is clearly intended

50a. In re Moench, 10 Am. B. R. 590, 123 Fed. 977.

51. See under Section Eighteen.

52. For practice, compare In re Taylor, 1 N. B. N. 412. For forms, see “Supplementary Forms,” post.

53. Compare In re Beddingfield, supra.

54. For a sufficient reason, see In re Lacey, supra.

55. See under Section Eighteen.

56. Compare In re Taylor, ante.

57. In re Rosenfelds, Fed. Cas. 12,061; In re Philadelphia Axle Works, Fed. Cas. 11,091. But see In re Sargent, Fed. Cas. 12,361.

58. See ante, under this Section and also § 58-a (8).

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Subs. g.]Dismissals of Petitions

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to prevent the use of the court as a means to compel a settlement with the petitioning creditor. It is in line with the principle that the filing of a petition confers jurisdiction as to all creditors as well as over all property; it guarantees them notice of the step which may end such jurisdiction. The cases under the present law and the practice have already been considered.<sup>59</sup>

**59.** See under Sections Eighteen and Fifty-eight. For forms, see "Supplementary Forms," post.

## SECTION SIXTY.

### PREFERRED CREDITORS.

§ 60. **Preferred Creditors.**— *a* A person shall be deemed to have given a preference if, being insolvent, he has, *within four months before the filing of the petition, or after the filing of the petition and before the adjudication,\** procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.\**

*b* If a bankrupt shall have given a preference<sup>1</sup> and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. *And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.\**

*c* If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

*d* If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer

1. Here the words "within four months before the filing of the petition, or after the filing of the petition" were stricken out by the amendatory act of 1903, and inserted in Subs. a.

\*Amendments of 1903 in italics.



§ 60.]

Analogous Provisions; Synopsis of Section.

property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

**Analogous provisions:** **In U. S.:** *As to voidable preferences*, Act of 1867, § 35, R. S., §§ 5128, 5130A; Act of 1841, § 2; Act of 1800, § 28; *As to fraudulent conveyances*, Act of 1867, § 35, R. S., §§ 5129, 5130A; *As to transfers out of the ordinary course of business being presumptively fraudulent*, Act of 1867, § 35, R. S., § 5130; *As to fraudulent preferences being an objection to a discharge*, Act of 1867, § 44, R. S., § 5110.

**In Eng.:** *As to "fraudulent" preferences*, Act of 1883, § 48; *As to "undue" preferences being an objection to a discharge*, Act of 1890, § 8 (3) (i).

**Cross references:** **To the law:** §§ 3-a (2)-d; 14-b (4); 18; 19; 23-b; 67; 70-e.

**To the General Orders:** None.

**To the Forms:** None.

## SYNOPSIS OF SECTION.

### I. Subs. a. What is a Preference.

History and Comparative Legislation.

*In the United States.*

The Present Definition.

*Cross-References.*

Effect of Definition Prior to Amendments of 1903.

The Elements of a Preference.

While Insolvent.

Within Four Months.

*Prior to the Amendments of 1903.*

*Running of Time where Evidence of Transfer Must or May be Recorded.*

Procured or Suffered a Judgment.

Made a Transfer of His Property.

*Transfers that are Voidable.*

## What is a Preference.

[§ 60.]

**I. Subs. a. What is a Preference — Continued.**

Effect, a Greater Percentage.

Creditors Only May be Preferred.

Illustrative Cases.

**II. Subs. b. What Preferences are Voidable.**

In General.

Four Months Before the Filing, etc.

The Person Receiving it.

Reasonable Cause to Believe a Preference Intended.

Belief or Knowledge of Agent or Attorney.

Recovery.

*By Whom.**Against Whom.**In What Court; the Amendments of 1903.**Permission to Sue.**Practice.***Property or Its Value.***Damages.**Costs.***III. Subs. c. Set-Off of a Subsequent Credit.**

Prior to Amendments of 1903.

Meaning of Subsection c.

**IV. Subs. d. Preference to Bankrupt's Attorney.**

In General.

*Practice.**Illustrative Cases.*

## I. Subs. a. WHAT IS A PREFERENCE.

**History and Comparative Legislation.**—A preference is a “conventional fraud;” the debtor merely prefers to pay one creditor more than, or to the exclusion of, others. At common law, such a payment or transfer was not even constructively fraudulent, though as early as 1635, preferential transfers were regulated by statute and, for more than a century, were punishable as crimes. Our modern doctrine that preferences are wrongs on other creditors was first declared by Lord Mansfield.<sup>2</sup> It was not reduced to a bankruptcy law definition until in the English Act of 1869; though the Insolvent Debtor Acts, beginning with that of 1824, contained clauses declaring what were preferences in cases where

<sup>2</sup>. *Worsely v. de Mattos*, 1 Burr. 467; *Alderson v. Temple*, 4 Burr. 2235.

Subs. a.]

What is a Preference, Continued.

debtors other than traders sought the refuge of the courts.<sup>3</sup> Even now the English law explains, rather than defines, what is a preference. Prior to these enactments, the courts had construed the word "preference" with considerable elasticity; the elements of proof varied from decade to decade, and many hair-splitting and sometimes inexplicable distinctions were made. The statutory definition in England is thus the result of more than a century of decisions, some of them by judges whose names have become household words. By § 48 of the Act of 1883, the elements of a preference are: (1) a payment or transfer or conveyance (2) by a person unable to pay his debts as they become due, (3) with a view to giving the person to whom it is made an advantage over other creditors, provided (4) such payment is made within three months of the bankruptcy. The English law specifically protects payments in due course of trade, and has since the middle of the eighteenth century;<sup>4</sup> hence, what are known as "protected transactions."

*In the United States.*—Our first definition of preferences in a bankruptcy law appears in that of 1841.<sup>5</sup> It is somewhat unscientific. That in the law of 1867 was identical with the present English definition, save in the time limit—four months instead of three—and the additional elements on the part of the creditor of (1) reasonable cause to believe that the debtor was insolvent, and (2) knowledge that the payment was in fraud of the act.<sup>6</sup>

**The Present Definition.**—This is discussed in detail, *post*. The wide gap between it and all definitions heretofore recognized should always be borne in mind. It makes many of the cases under the former law inapplicable. Briefly, it differs from the present English definition in (1) the elimination of "intent" and the substitution of "the result of the act," and (2) in making the preference period four months instead of three; while, when considered as an act that is voidable, it differs from that of our law of 1867, not only in substituting the result for the intent save in so far as the latter is an element of "reasonable cause to believe," but also in requiring the attacking trustee to show only that the creditor had

3. For historical review, see *In re Hall*, 4 Am. B. R. 671.

4. Act of 1883, § 49.

5. Act of 1841, § 2.

6. § 35, R. S., § 5128. The amendatory act of 1874 changed "belief" of a fraud on the act to "knowledge."

reasonable cause to believe that a preference was intended instead of the more difficult elements of proof, indicated above. The present law, too, distinguishes between a mere preference in fact and one that is voidable.<sup>7</sup> The effect of the amendments of 1903 are considered later.

*Cross-References.*—As has been explained elsewhere, subdivision a has been held a definition of "preference."<sup>8</sup> It has been doubted whether this is altogether accurate.<sup>9</sup> Certainly a preference which amounts to an act of bankruptcy must still show intent,<sup>10</sup> and the so-called definition does not exactly dove-tail into another subsection.<sup>11</sup> It, however, is a definition when applied to a transaction voidable under subdivision b.

**Effect of Definition Prior to Amendments of 1903.**—The controversy touching the effect of this new definition on transactions in due course of trade has now passed into history. In brief, the view that subsection a defined a preference led to the doctrine that payments on account after insolvency were preferences without either knowledge of insolvency on the part of the debtor, or reasonable cause to believe that a preference was intended on the part of the creditor; a doctrine that reversed the rule that good faith was the test and rendered cash transactions in business not only the safest course, but, in effect, essential.<sup>12</sup> As a consequence, the meaning of both subsection b and subsection c was greatly enlarged by judicial construction. Indeed, the very existence of the bankruptcy system was for a time put in jeopardy. The reports are full of cases bearing on these much-mooted questions. The amendatory act of 1903 has brought the statute back to what its framers intended it to say, and thus made most of these cases valueless. Some of them are collated in the foot-note.<sup>13</sup>

7. For an unusual case, see *In re Chaplin*, 8 Am. B. R. 121, 115 Fed. 162.

8. See under Section One, ante.

9. It has been held merely a "rule of evidence" (*In re Piper*, 2 N. B. N. Rep. 7). See also *Stern v. Louisville Trust Co.*, 7 Am. B. R. 305, 112 Fed. 501.

10. See § 3-a (2), and the cases cited.

11. § 67-c (1). Compare *In re McLam*, 3 Am. B. R. 245.

12. "This was never intended by the framers of the law, and it works obvious injustice and is the source of 99% of the objections to the law." (House Judiciary Committee's Report accompanying amendatory bill, April 21, 1902.)

13. That partial payments in due course of trade are "preferences:" *In re Knost*, 2 Am. B. R. 471; affirmed as *Strobel v. Knost*, 3 Am. B. R. 631, 99 Fed. 409; *In re Conhaim*, 3 Am. B. R. 249, 97 Fed. 923;

Subs. a.]

The Elements of a Preference.

**The Elements of a Preference.**—Since the amendatory act, a preference consists in a person, (1) while insolvent and (2) within four months of the bankruptcy, (3) procuring or suffering a judgment to be entered against himself or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee, if (5) the person recovering it or to be benefited thereby has (6) reasonable cause to believe that it was thereby intended to give a preference.<sup>14</sup> These elements of proof are discussed in detail, *post*.

**While Insolvent.**—The word “insolvent” has the same meaning here as elsewhere in the act.<sup>15</sup> The burden of showing it is on him who alleges it.<sup>16</sup> The debtor must have been insolvent at the time the preference was committed.<sup>17</sup> If the levy following the judgment causes the insolvency, it is not enough.<sup>18</sup> But insol-

In re Fort Wayne Electric Co., 3 Am. B. R. 186, 96 Fed. 803; affirmed as Columbus Electric Co. v. Worden, 3 Am. B. R. 634, 99 Fed. 400; In re Fixen, 4 Am. B. R. 10, 102 Fed. 295; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 5 Am. B. R. 814; that they are not: In re Piper, *supra*; In re Smoke, 4 Am. B. R. 434, 104 Fed. 289; In re Hall, 4 Am. B. R. 671; In re Ratliff, 5 Am. B. R. 713, 107 Fed. 780. See, for a vigorous protest against the doctrine of Pirie v. Chicago Title & Trust Co., In re Dickson, 7 Am. B. R. 186, 111 Fed. 726. There are also numerous cases pro and con, (1) whether a payment which exactly cancels one of several obligations must be surrendered (for instance, see In re Conhaim, *supra*, also In re Beswick, 7 Am. B. R. 395, and Kimball v. Rosenham Co., 7 Am. B. R. 718, 114 Fed. 185; In re Seay, 7 Am. B. R. 700, 113 Fed. 969, and In re Beswick, 7 Am. B. R. 403), and (2) whether a subsequent credit could be set off against a preference, some of which are cited later under this Section. None of these cases are thought now applicable.

14. No matter how devious the

scheme (see In re Belding, 8 Am. B. R. 718, 116 Fed. 1016), if it come fairly within the purpose of the statute as evidenced by its words, it will be a voidable preference. See Stern v. Louisville Trust Co., 7 Am. B. R. 305, 112 Fed. 501; In re Beerman, 7 Am. B. R. 431, 112 Fed. 662. For a case where nearly all the elements were lacking, see Brown v. Guichard, 7 Am. B. R. 515.

15. See § 1 (15). Compare In re Alexander, 4 Am. B. R. 376, 102 Fed. 464. For rule under former law, see Toof v. Martin, 13 Wall. 40; Wager v. Hall, 16 Wall. 584. Marvin v. Anderson, 6 Am. B. R. 520, is, therefore, more in line with the old definition than the new.

16. In re Chappell, 7 Am. B. R. 608, 113 Fed. 545.

17. In re Wittenberg, etc., Co., 6 Am. B. R. 271, 108 Fed. 503. Compare Sabin v. Camp, 3 Am. B. R. 578, 98 Fed. 974.

18. Chicago Title & Trust Co. v. Roebing's Sons, 5 Am. B. R. 368, 107 Fed. 71. See also Clarion Bank v. Jones, 21 Wall. 325; Otis v. Hadley, 112 Mass. 100.

vency must be alleged and found as a fact; mere belief is not enough,<sup>19</sup> nor is danger of insolvency as a coming result.<sup>20</sup>

**Within Four Months.**— This means within four months of the inception of the proceeding, in the words of the statute “before the filing of the petition.” The method of computing time is considered elsewhere.<sup>21</sup> But if the preference was given before the passage of the bankruptcy law, it cannot be disturbed.<sup>22</sup> Nor can it if done in pursuance of a valid contract more than four months old.<sup>23</sup> The period ordinarily begins to run from the moment the judgment or transfer takes effect.<sup>24</sup> Where possession is taken by the creditors of an insolvent debtor’s property within four months before the filing of the petition, under an agreement, whereby a lien was created in favor of the creditors upon such property in case of a failure of the debtor to comply with the terms of such agreement, such assumption of possession will constitute an unlawful preference notwithstanding the fact that the agreement was made prior to the four months’ period.<sup>24a</sup>

*Prior to the Amendments of 1903.*— This clause was in subdivision b in the original law. It led to the anomalous doctrine that mere preferences, as, for instance, *bona fide* payments, must be surrendered if since insolvency, no matter how many months or years back, but fraudulent preferences were good unless within the four months’ period.<sup>25</sup> This dilemma was the direct result of *Pirie v. Chicago Title & Trust Co.*,<sup>26</sup> and gave force to the demand for amendment. The clause has now been restored to subsection a,

19. *Wager v. Hall*, ante. Compare also *In re Linton*, 7 Am. B. R. 676.

20. *Beals v. Quinn*, 101 Mass. 262.

21. See under Section Thirty-one. See also *Whitley, etc., Co. v. Roach*, 8 Am. B. R. 505.

22. *In re Terrill*, 4 Am. B. R. 145, 100 Fed. 778. As to the effect of this doctrine on a case which would be a voidable preference under the law as amended, but which was not before, *quære*, and see “Supplemental Section to Amendatory Act,” post.

23. *Sabin v. Camp*, ante. But compare *In re Sheridan*, 3 Am. B. R. 554, 95 Fed. 406.

24. See *Sawyer v. Turpin*, 91 U. S. 114; *In re Foster*, Fed. Cas. 4,964.

24a. *Matthews v. Hardt*, 9 Am. B. R. 373.

25. For instance, see the now inapplicable cases of *In re Jones*, 4 Am. B. R. 563; *In re Abraham Steers Lumber Co.*, 6 Am. B. R. 315, 110 Fed. 738; affirmed, s. c., 7 Am. B. R. 332, 112 Fed. 406; *In re Rosenberg*, 7 Am. B. R. 316; also the numerous cases contra, of which the following are characteristic: *In re Wise*, 2 N. B. N. Rep. 151; *In re Beswick*, 7 Am. B. R. 395; *In re Siegel-Hillman, etc., Co.*, 2 N. B. N. Rep. 937; *In re Dickinson*, 7 Am. B. R. 679.

26. 182 U. S. 438, 5 Am. B. R. 814.

Subs. a.]

Procured or Suffered a Judgment.

where it was in the Torrey bill.<sup>27</sup> No transaction can now be held a preference unless complete within four months of the petition, or, if after the petition, if before the adjudication.

*Running of Time where the Evidence of Transfer Must or May be Recorded.*—The concluding sentence of subdivision a is new. It was inserted by the amendatory act of 1903. Its purpose is apparent—to meet the decisions that held the date of the delivery of a preferential instrument, rather than the date of its record, the beginning of the four months' period.<sup>28</sup> Its parentage, a similar clause in § 3-b, is clear. The Ray bill also contained after "required" the words: "or permitted, or, if not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property transferred." For some reason the Senate struck out these words. The result will prove unfortunate. The concealment of preferences through the four months, and thus the accomplishment of gross frauds on creditors, will be possible, unless the preference is accomplished by an instrument which must be recorded. The evils aimed at by the Ray amendment are but partially eradicated.<sup>29</sup> There is thus a wide gap between the concluding sentence of § 3-b and that in the subsection under discussion. The omission of words equivalent to "unless the petitioning creditors have received actual notice of such transfer or assignment," found in § 3-b,<sup>30</sup> should be noted. For the effect of this new element of pleading and proof on a cause of action antedating February 5, 1903, see "Supplementary Section to Amendatory Act," *post*.

**Procured or Suffered a Judgment.**—The words here are not the same as those in § 3-a (3); indeed, they seem an inheritance from the law of 1867.<sup>31</sup> "Procuring" a judgment implies active agency on the part of the debtor. It is very different from "permitting" the same thing. But the disjunctive "or" is used, as is the word

27. See *In re Hall*, ante. Compare Report No. 1,698, 57th Congress, First Session, pp. 3, 8.

28. *In re Wright*, 2 Am. B. R. 364, 96 Fed. 187; *In re Mersman*, 7 Am. B. R. 46; *In re Kindt*, 4 Am. B. R. 148, 101 Fed. 107. Apparently contra, *In re Klingaman*, 4 Am. B. R. 254, 101 Fed. 691; *Babbitt v. Kelly*, 9 Am. B. R. 335 (Mo. App.), 70 S. W. 384.

29. For these, see *In re Mersman*, supra. As to splitting days into hours, see *In re Tonawanda Street Planing Mill*, 6 Am. B. R. 38, and cases cited.

30. On this general subject, the practitioner should consult the discussion of this subsection, found in Section Three.

31. Act of 1867, § 39.

"suffered," and cases in point under § 3-a (3) are probably equally in point as to preferences which are voidable. Thus, *Wilson v. The City Bank*<sup>32</sup> is no longer controlling even here. The crucial element of intent is now unnecessary. The few decisions under the present law directly in point are to like effect.<sup>33</sup> Cases under the former law on the meaning of "suffer or procure" should be cited with caution.<sup>34</sup>

**Made a Transfer of His Property.**—The word "transfer" here includes every mode of disposing of or parting with property.<sup>35</sup> It includes the payment of money.<sup>36</sup> The method of transfer is immaterial, and this was so under the former law.<sup>37</sup> A resultant inequality being now the essence of a preference, it makes no difference whether the transferee was coerced by his creditor.<sup>38</sup> A fictitious transaction not affecting the estate of the debtor or the rights of creditors cannot be deemed a transfer, although assuming the form of one.<sup>38a</sup> So, also, where the transfer does not diminish the general fund, as where it consists of the giving of a fair security for a present loan,<sup>39</sup> the substitution of securities pledged to an old loan,<sup>40</sup> or a pledge or payment for a consideration given in the present or to be given in the future, whether in money, goods, or services,<sup>40a</sup>

32. 17 Wall. 473.

33. In re Collins, 2 Am. B. R. 1; In re Richards, 2 Am. B. R. 518, 95 Fed. 258.

34. The following are typical: Little v. Alexander, 21 Wall. 500; Tenth Nat. Bank v. Warren, 96 U. S. 539; Sage v. Wynkoop, 104 U. S. 319; In re Dunkle, Fed. Cas. 4,160; In re Baker, Fed. Cas. 763.

35. § 1 (25).

36. Pirie v. Chicago, etc., Trust Co., 182 U. S. 438, 5 Am. B. R. 814; Jaquith v. Alden, 189 U. S. 78, 82, 9 Am. B. R. 773; New York Co. Nat. Bank v. Massey, 192 U. S. 138, 11 Am. B. R. 42; In re Fixen, ante; In re Arndt, 4 Am. B. R. 773, 104 Fed. 234; In re Sloan, 4 Am. B. R. 356, 102 Fed. 116; In re Warner, Fed. Cas. 17,177; In re Clark, Fed. Cas. 2,812.

37. Stern v. Louisville Trust Co., ante; Gibson v. Dobie, Fed. Cas. 5,394; In re Waite, Fed. Cas. 17,044.

38. See Clarion Bank v. Jones, ante; Giddings v. Dodd, Fed. Cas.

5,405; In re Batchelder, Fed. Cas. 1,098.

38a. In re Steam Vehicle Co., 10 Am. B. R. 385, 121 Fed. 939.

39. In re Wolf, 3 Am. B. R. 555, 98 Fed. 74; First Nat. Bank v. Penn Trust Co., 10 Am. B. R. 782, 124 Fed. 968; Tiffany v. Boatman's Sav. Bank, 18 Wall. 375.

40. See Cook v. Tullis, 18 Wall. 332; Sawyer v. Turpin, 91 U. S. 114; Clark v. Iselin, 21 Wall. 369; Stewart v. Platt, 101 U. S. 731; Birnhisel v. Firman, 22 Wall. 170; In re Weaver, Fed. Cas. 17,307; Butt v. Carter, Fed. Cas. 1,844.

40a. Furth v. Stahl, 10 Am. B. R. 442, 205 Pa. St. 439. See also Dressel v. North State Lumber Co., 9 Am. B. R. 441, 119 Fed. 531, holding that the return of money to a bankrupt advanced to the bankrupt upon a check under an agreement that it was to be used to obtain a loan, which was not made, is not a preferential payment to the bankrupt.



Subs. a.]

Transfers that are Voidable.

no preference results. Conversely, and for the same reason, any transfer within the statutory time by way of payment on or security of an antecedent debt is a preference.<sup>41</sup> A transfer of firm property in payment of an individual partner's debt is a preference,<sup>42</sup> but the firm must be adjudged bankrupt before a suit can be brought to avoid it.<sup>43</sup> A deposit of money in a bank, upon an open account, subject to check, is not a transfer constituting a preference, although the bank as a creditor has the right to set off its claim against the deposit.<sup>43a</sup> A post-dated check constitutes a transfer at the time of its payment, and the question of preference under the statute is to be determined by the conditions existing at such time.<sup>43b</sup> An absolute transfer of an account against an insolvent debtor made in good faith to a person who afterward purchases goods from the debtor and gives in payment therefor the account thus transferred to him, is not a transaction especially prohibited by the bankruptcy act.<sup>43c</sup> But if such a transaction was entered into for the purpose of indirectly evading the provisions of the act and procuring an undue preference to the creditor, it is voidable. The question of the validity of the transaction will probably be deemed in every instance one of good faith.<sup>43d</sup>

*Transfers that are Voidable.*—The practitioner should always have in mind that, under the present law, many transfers are preferences in name but not in fact. To be the latter, the remedy prescribed in subdivision b must at least be available. The transfers must, in short, be voidable. Of the multitude of cases under the

41. In re Belding, ante; In re Cobb, 3 Am. B. R. 129, 96 Fed. 821; In re Wolf, ante; In re Jones, 9 Am. B. R. 262, 118 Fed. 673; In re Montgomery, Fed. Cas. 9,732; Coggeshall v. Potter, Fed. Cas. 2,955. But compare Brooks v. Davis, Fed. Cas. 1,950; Adams v. Merchants' Bank, 2 Fed. 174. It is suggested that In re Sanderlin, 6 Am. B. R. 384, 109 Fed. 857, is more reliable authority here than is McNair v. McIntyre, 7 Am. B. R. 638, 113 Fed. 113, that reversed it.

42. In re Gillette et al., 5 Am. B. R. 119, 104 Fed. 769. See also In re Beerman, 7 Am. B. R. 431, 112 Fed. 662.

43. Withrow v. Fowler, Fed. Cas. 17,910. Compare Amsinck v. Bean, 22 Wall. 395.

43a. New York Co. Nat. Bank v. Massey, 192 U. S. 138, 11 Am. B. R. 42; In re Hill Co., 12 Am. B. R. 221 (C. C. A.), 130 Fed. 315.

43b. In re Lyon, 10 Am. B. R. 25 (C. C. A.), 121 Fed. 723, affirming 7 Am. B. R. 412.

43c. Hackney v. Raymond Bros. Clarke Co., 10 Am. B. R. 213 (Nebr. Sup. Ct.); Lyon v. Clarke (Mich. Sup. Ct.), 88 N. W. 1046; North v. Taylor, 6 Am. B. R. 233, 61 App. Div. 253, 70 N. Y. Supp. 338.

43d. Hackney v. Raymond Bros. Clarke Co., 10 Am. B. R. 213 (Nebr. Sup. Ct.). As to preferences obtained indirectly, see In re Beerman, 7 Am. B. R. 431, 112 Fed. 663; Frank v. Musliner, 9 Am. B. R. 229, 76 N. Y. App. Div. 617.

present law, only those including the element of reasonable cause to believe,<sup>44</sup> are, therefore, still in point. The others, since the changes made in § 57-g, are of value only by way of possible suggestion.

**Effect, a Greater Percentage.**—As already indicated, this is now the supreme test. Intent, save as evidence of a reasonable cause to believe, is immaterial; it has given place to the new element, resultant inequity.<sup>45</sup> But the “greater percentage” refers only to creditors of the same class. This is the reason why the payment of wages is not a preference.<sup>46</sup> If the effect of the transfer is to enable the creditor to receive out of the debtor’s estate a larger percentage of his claim than other creditors of the same class, it constitutes a preference.<sup>46a</sup>

**Creditors Only May be Preferred.**—Though the words “person” and “creditor” are used interchangeably in this subsection, it is clear that only a creditor can receive a preference.<sup>47</sup> A payment or transfer to any one other than a creditor, unless for the latter’s benefit, falls within the remedies indicated in §§ 67-e and 70-e. This was also so under the former law, though voidable preferences and fraudulent transfers were regulated by a single section.<sup>48</sup> Then, as now, the elements of these analogous transactions were somewhat different. The practitioner, therefore, should at the outset of a suit to recover decide whether the proposed defendant is a creditor or not. Pleading, proof, and possibly judgment will depend upon such decision.

*Illustrative Cases.*—Many of the more valuable cases under the present law are collated in the foot-note.<sup>49</sup>

44. See this subject, generally, under this Section, post.

45. Compare *Crooks v. The People's Bank*, 3 Am. B. R. 238.

46. In *re Keller*, 6 Am. B. R. 334. Compare *Swarts v. Bank*, 8 Am. B. R. 673, 117 Fed. 1.

46a. *Western Tie & Timber Co. v. Brown*, 12 Am. B. R. 111 (C. C. A.), 129 Fed. 728. See also *Brittain Dry Goods Co. v. Bertenshaw*, 11 Am. B. R. 629 (Kan. Sup. Ct.); *Matter of Cotton Export, etc., Co.*, 10 Am. B. R. 14 (C. C. A.), 121 Fed. 663; In *re Douglas Coal & Coke Co.*, 12 Am.

B. R. 539, 131 Fed. 769. A distress for rent by a landlord does not enable the landlord to obtain a greater percentage of his debt than other creditors of the same class, where there is but one landlord. In *re Belknap*, 12 Am. B. R. 326, 129 Fed. 646.

47. *Swarts v. Siegel*, 8 Am. B. R. 220, 114 Fed. 1001.

48. § 35. In the Revised Statutes, this section was broken up into two, §§ 5128, 5129.

49. The following have been held not to be preferences, even within the four months’ period: The pay-

Subs. b.]

What Preferences are Voidable.

## II. Subs. b. WHAT PREFERENCES ARE VOIDABLE.

**In General.**— Since the amendatory act of 1903, a preference is a name only, unless it may be avoided. Under the law of 1867, prefer-

ment of wages (In re Read, 7 Am. B. R. 111; In re Abraham Steers Lumber Co., ante; In re Feuerlicht, 8 Am. B. R. 550. Contra, In re Proctor, 6 Am. B. R. 660; In re Kohn, 2 N. B. N. Rep. 367); the payment of checks given by a corporation to its president for present advances with which to pay wages (In re Union, etc., Co., 7 Am. B. R. 472, 112 Fed. 774); the renewal of notes more than four months old (Chattanooga Bank v. Rome Iron Co., 4 Am. B. R. 441, 102 Fed. 755); the payment of interest on notes (In re Keller, 6 Am. B. R. 621, 110 Fed. 348); the payment of installments of rent (In re Barrett, 6 Am. B. R. 199. Compare In re Lange, 3 Am. B. R. 231); the avails of book accounts assigned as collateral to a present loan (Young v. Upson, 8 Am. B. R. 377, 115 Fed. 192); the collection and application of the avails of collateral security given before the period (In re Little, 6 Am. B. R. 681, 110 Fed. 621); the proceeds of a pledged fire insurance policy (In re West Norfolk Lumber Co., 7 Am. B. R. 648, 112 Fed. 759. See also McDonald v. Dascam, 8 Am. B. R. 543, 116 Fed. 276); a payment to an official successor under order of court (Fry v. Penn Trust Co., 5 Am. B. R. 51); a payment in pursuance of a valid executory contract more than four months old (Sabin v. Camp, 3 Am. B. R. 578, 98 Fed. 974. Apparently contra, In re Sheridan, 3 Am. B. R. 554, 98 Fed. 406); payments to a surety who afterward pays the bankrupt's debt (In re New, 8 Am. B. R. 566, 116 Fed. 116); where a sheriff still has in his hands money collected on an execution (In re Kenney, 3 Am. B. R. 353, 97 Fed. 554. Compare, however, In re Blair, 4 Am. B. R. 220, 102 Fed. 987); where a banker applies a deposit due the bankrupt on the notes of the latter (In re Elsasser, 7 Am. B. R. 215; In re Hill Co., 12 Am. B. R. 221 (C.

A.), 130 Fed. 315; New York Co. Nat. Bank v. Massey, 192 U. S. 138, 11 Am. B. R. 42); and where a mortgage is taken as security by a lender who knows that the borrower is hard pressed, the latter using the money to pay his debts (In re Pearson, 2 Am. B. R. 482. See also In re Harpke, 8 Am. B. R. 535, 116 Fed. 295); payment of interest on dower (In re Riddle's Sons, 10 Am. B. R. 204, 122 Fed. 559).

The following have been held preferences: Attachments (In re Burlington Malting Co., 6 Am. B. R. 369, 109 Fed. 777; In re Schenkein, 7 Am. B. R. 162, 113 Fed. 421; though, whether this will continue to be held under the changed conditions resulting from the amendments of 1903, may be doubted); a payment to a third person to relieve an indorser, the third person not having reasonable cause to believe, etc. (Landry v. Andrews, 6 Am. B. R. 281. Compare In re Dundas, 7 Am. B. R. 129, 111 Fed. 500); a payment on indorsed notes, the indorser being good (Swarts v. Bank, 8 Am. B. R. 673, 117 Fed. 1); a transfer of all the bankrupt's assets to a liquidator (In re Wertheimer, 6 Am. B. R. 187); a cash sale of all property to an outsider and payment in full of several creditors (Boyd v. Lemon Gale Co., 8 Am. B. R. 81, 114 Fed. 647); the taking back of goods, whether hypothecated or sold, and the application of their value on account or in full (In re Klingman, ante; Silberstein v. Stahl, 4 Am. B. R. 626); a payment after insolvency by means of a post-dated check (In re Lyon, 7 Am. B. R. 412, 114 Fed. 326; affirmed, 10 Am. B. R. 25, 121 Fed. 723); a loan by a banker to the bankrupt of the amount of the latter's deposit (In re Cobb, 3 Am. B. R. 129, 96 Fed. 821); deposits made in cancellation of overdrafts (In re Keller, supra); a payment on the bankrupt's note after its sale to and discount by a bank (In re

ences were *per se* void.<sup>50</sup> This, however, seems often to have been a distinction without a difference. Strictly, the preference being void, no title passed to the creditor preferred, and the words "may recover the property," etc., in § 39 of that law were surplusage. Preferences now are not void, but voidable, *i. e.*, title has passed and recovery must be had. This is doubtless in line with the policy of the law, as evidenced by § 70-a, to protect intervening innocent purchasers. The resultant distinctions have been somewhat discussed.<sup>51</sup> The fact to be noted here is, however, that this subdivision closely fits both in phrase and in purpose the corresponding clauses in the law of 1867. Cases under that law are thus still applicable both as to what is "reasonable cause to believe" and the practice on and measure of damages in suits to recover.<sup>52</sup>

**Four Months Before the Filing, etc.**—These words, which were in this subsection in the original law, are now in subsection a.<sup>53</sup>

**The Person Receiving it.**—A transfer may be made to a third person and still be a preference; for a creditor may be benefited thereby.<sup>53a</sup> Hence, the phrasing "the person receiving it, or to be benefited thereby;" words found in the same connection in the law of 1867.<sup>54</sup> It seems to follow, from the last words in the subsection

Waterbury Furniture Co., 8 Am. B. R. 79, 114 Fed. 225; the making of a lease (Carter v. Goodykoontz, 2 Am. B. R. 224, 94 Fed. 108); repayment of a loan out of a certain fund under an agreement entered into when the loan was made (Torrance v. Winfield Nat. Bank, 11 Am. B. R. 185); agreement that chattel mortgage, executed prior to four months shall be lien on certain specified articles made within said period (First Nat. Bank v. Johnson, 10 Am. B. R. 208). See also In re Colton, etc., Co., 8 Am. B. R. 257, 115 Fed. 158; In re Metzger, etc., Co., 8 Am. B. R. 307, 114 Fed. 957; Swarts v. Siegel, 8 Am. B. R. 690, 117 Fed. 13.

The practitioner should, however, note that the provocation for many of these decisions—the necessity of surrender of "innocent" partial payments—is now gone. It will bear

repetition that none of them are now valuable unless they show the all-essential element of voidable preferences: "reasonable cause to believe that a preference was intended."

50. Atkins v. Spear, 49 Mass. 490; Zahm v. Fry, Fed. Cas. 18,198; Rison v. Knapp, Fed. Cas. 11,861.

51. See In re Phelps, 3 Am. B. R. 396; In re Cobb, ante.

52. See cases cited later under this Section.

53. See sub nom. "Within Four Months," in this Section, ante.

53a. Western Tie & Timber Co. v. Brown, 12 Am. B. R. 111 (C. C. A.), 129 Fed. 728.

54. § 35. Compare Bartholow v. Bean, 18 Wall. 635; Graham v. Stark, Fed. Cas. 5,676; Ahl v. Thorner, Fed. Cas. 103; Cookingham v. Morgan, Fed. Cas. 3,183.

## Subs. b.] Reasonable Cause to Believe a Preference Intended.

that the suit can be brought not only against the creditor or his agent, but also against a transferee not a creditor.

**Reasonable Cause to Believe a Preference Intended.**—The former law and the present are here not exactly equivalent; though the phrase "reasonable cause to believe" occurs in both. Its meaning is not easily explained. Each case will turn on its own facts.<sup>55</sup> Still, the cases under both laws permit the statement that "reasonable cause to believe" does not require proof either of actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that a preference was intended.<sup>56</sup> Under the former law, any transfer out of due course of trade was *prima facie* evidence of fraud;<sup>57</sup> even in the absence of this provision, the same rule probably applies to preferences under the law of 1898.<sup>58</sup> That reasonable cause to believe must exist at the time of the alleged preference also follows.<sup>59</sup> But there must be something more than a mere guess or suspicion.<sup>60</sup> Further, while proof of belief in insolvency is not now necessary,<sup>61</sup> it will without such proof be somewhat difficult to show a belief that a preference was intended. It is not thought that this element of a voidable preference will be difficult of proof. Reasonable cause to believe a preference intended is a very different thing from intent to prefer, *per se*. As the law now stands it is sufficient that a transfer of the insolvent's property is made, which has the effect to give

55. For instance: *North v. Taylor*, 6 Am. B. R. 233; *Crooks v. People's Bank*, ante; *Peck v. Connell*, 8 Am. B. R. 500, affirming s. c., 6 Am. B. R. 93; *Lever v. Seiter*, 8 Am. B. R. 459; *Matter of Bartheleme*, 11 Am. B. R. 67; *Baden v. Bertenshaw*, 11 Am. B. R. 308 (Kan. Sup. Ct.); *Ryttenberg v. Schefer*, 11 Am. B. R. 652; *Pratt v. Christie*, 12 Am. B. R. 1, 95 App. Div. (N. Y.) 282. Compare also *In re Wylly*, 8 Am. B. R. 604, 116 Fed. 38, and *In re Bullock*, 8 Am. B. R. 646, 116 Fed. 667.

56. *In re Jacobs*, 1 Am. B. R. 518; *In re Richards*, 2 Am. B. R. 518, 95 Fed. 258; *In re Eggert*, 3 Am. B. R. 541, 98 Fed. 843; s. c. on appeal, 4 Am. B. R. 449, 102 Fed. 735; *Crittenden v. Barton*, 5 Am. B. R. 775; *Sebring v. Wellington*, 6 Am. B. R.

671; *Hackney v. Raymond Bros. Clarke Co.*, 10 Am. B. R. 213 (Nebr. Sup. Ct.); *Toof v. Martin*, ante; *Wager v. Hall*, ante; *Buchanan v. Smith*, 16 Wall. 277; *Grant v. Bank*, 97 U. S. 80; *Rison v. Knapp*, ante; *In re McDonough*, Fed. Cas. 8,775; *Webb v. Sachs*, Fed. Cas. 17,325.

57. § 35, R. S., § 5130.

58. *Walbrun v. Babbitt*, 16 Wall. 577. Compare *In re Eggert*, supra.

59. *In re Hunt*, Fed. Cas. 6,881; *Crump v. Chapman*, Fed. Cas. 3,455; *In re Ouimette*, Fed. Cas. 10,622.

60. *Forbes v. Howe*, 102 Mass. 427.

61. *In re H. C. King Co.*, 7 Am. B. R. 619, 113 Fed. 110. But see *Des Moines Sav. Bank v. Morgan Co.*, 12 Am. B. R. 781, 123 Iowa, 432.

a preference, and that the party who receives it has reasonable cause to believe that it is intended by the party who procures the transfer, or who gives to the transfer the effect of a preference, that it should have that effect, although the insolvent is innocent of that intention.<sup>61a</sup> Whether or not the creditor has reasonable cause to believe the debtor insolvent is a question of fact.<sup>61b</sup> The fact that most of the bankrupt's indebtedness to a creditor was past due at the time of a payment on account within the four months' period is not sufficient to charge the creditor with notice of the bankrupt's insolvency, and that a preference was intended.<sup>61c</sup> Where there is no evidence tending to show that a creditor had reasonable cause to believe that payments made by the bankrupt were intended as a preference a recovery cannot be had;<sup>61d</sup> the law presumes that such payments are legal and the burden of proof is on the trustee, seeking to recover them, to overcome this presumption.<sup>61e</sup>

**Belief or Knowledge of Agent or Attorney.**—Here the statute states the rule of law, *i. e.*, that any knowledge possessed by the agent of the creditor may be imputed to the latter;<sup>62</sup> but not if, when acquired, the agent was acting in his own interest.<sup>63</sup> This general rule extends to such agents as attorneys-at-law,<sup>64</sup> but not where the

61a. *Western Tie & Timber Co. v. Brown*, 12 Am. B. R. 111, 129 Fed. 728; *Benedict v. Deshel*, 11 Am. B. R. 20, 177 N. Y. 1.

61b. *Hackney v. Raymond Bros. Clarke Co.*, 10 Am. B. R. 213 (Nebr. Sup. Ct.); *Landry v. First Nat. Bank*, 11 Am. B. R. 223 (Kan. Sup. Ct.); *Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa, 368; and is not reviewable by the Supreme Court, *Kaufman v. Tredway*, 12 Am. B. R. 682 (U. S. Sup.).

61c. *In re Goodhile*, 12 Am. B. R. 374. In this case the court laid down the rule that under the present law the condition of the debtor's affairs must be known to be such that prudent business men would conclude that the aggregate of the debtor's property, at a fair valuation, was not sufficient to pay his debts, before there is reasonable cause to believe that the debtor is insolvent, and that a preference would, therefore, be the result of a payment while in such con-

dition. See *Bardes v. First Nat. Bank*, 12 Am. B. R. 771, 122 Iowa, 443.

61d. *Keith v. Gettysburg Nat. Bank*, 10 Am. B. R. 762, 23 Pa. Super. Ct. 14.

61e. See *Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa, 368. The plaintiff must prove, in order to establish his cause of action, that when the creditor received the payment he had reasonable ground to believe that it was intended as a preference. *Benedict v. Deshel*, 11 Am. B. R. 20, 177 N. Y. 1.

62. *Rogers v. Palmer*, 102 U. S. 263; *Sage v. Wynkoop*, Fed. Cas. 12,215. See also *Babbitt v. Kelly*, 9 Am. B. R. 335 (Mo. App.), 70 S. W. 384.

63. *Crooks v. Bank*, ante.

64. *In re Ebert*, 1 Am. B. R. 340; *In re Dunavant*, 3 Am. B. R. 41, 96 Fed. 542; *Rogers v. Palmer*, supra; *Vogle v. Lathrop*, Fed. Cas. 16,985; *Brown v. Jefferson County Bank*, 9 Fed. 258.

Subs. b.]

Recovery; by and against Whom.

attorney acquired it while acting as attorney for the debtor;<sup>65</sup> to sub-agents,<sup>66</sup> but not, it seems, to attorneys of such sub-agents.<sup>67</sup> This latter rule, though supported by high authority, may be doubted; it would leave a tempting loophole to the "diligent" creditor.

**Recovery.**— Where all the elements of a voidable preference previously outlined exist, the property affected or its value may be recovered.

*By Whom.*— Clearly, by the trustee only. Any other rule, even were the statute not clear on this point, would lead to confusion. But, if the trustee refuses to sue, it has been held that a creditor may be permitted to do so for the benefit of all.<sup>68</sup> It is unfortunate that, in cases where the outlook seems hopeless, and one creditor or a combination of creditors at their own expense proceed and recover, they must share with the others the fruits of their zeal.<sup>69</sup> To be sure, the amendatory act of 1903 saves to them their reasonable expenses,<sup>70</sup> but in asset cases this is of little importance. Pro-rating among all may be equitable; but, where a few bear the burden and heat of the day, the hangers-back should not share in the reward. This is, however, a basic weakness of all bankruptcy systems, and a feasible lawful remedy is not yet in sight.

*Against Whom.*— Here the words of the statute are clear: the person "recovering it or to be benefited thereby."

*In What Court; the Amendments of 1903.*— This subject has been discussed in detail elsewhere.<sup>71</sup> The condition of things prior to the amendatory act was almost intolerable, the state courts being unconsciously hostile and their calendars so crowded as to preclude speedy trials. The sentence at the end of the subsection was inserted by the amendatory act of 1903. The words inserted in § 23-b by the same act clearly refer to this new sentence and remove all doubt that hereafter, as under the law of 1867, all suits to avoid

65. In re Ebert, supra; Mayer v. Glenn v. Langdon, 98 U. S. 20; In Hermann, Fed. Cas. 9,344; The Distilled Spirits, 11 Wall. 356. re Rothschild, 5 Am. B. R. 587.

66. Storrs v. City of Utica, 17 N. Y. 104.

67. Hoover v. Wise, 91 U. S. 308.

68. Compare under Section Eleven, ante. See also, on the general proposition that only a trustee should sue,

69. For an unsuccessful attempt to cure this defect in the bankruptcy system, see In re McNamara, 2 N. B. N. Rep. 341.

70. § 64-b (2), as amended.

71. See under Section Twenty-three, ante.

preferences may be brought either in the district court or in the state court which would have had jurisdiction had not bankruptcy intervened. It is thought that where the federal district court is convenient of access, suits of this character will hereafter be brought in that court, and their determination hastened by a reference to the referee, as special master. Such suits are analogous to judgment creditors' suits to set aside fraudulent conveyances, and are, therefore, properly within the equity jurisdiction of the court.<sup>71a</sup> The words "any court of bankruptcy" seem to imply that the district court, while so sitting, is still exercising its bankruptcy jurisdiction.

*Permission to Sue.*—While not strictly necessary, good practice seems to require the trustee to ask permission to bring a suit to avoid a preference.<sup>72</sup>

*Practice.*—The practice in such suits is regulated by the rules applicable to the court in which they are brought. The right to a jury trial is considered elsewhere.<sup>73</sup> Careful pleading is essential. Some of the more valuable discussions on practice under the present law will be found in the foot-note.<sup>74</sup>

**Property or Its Value.**—Similar words were used in the law of 1867. The option of suing for the property or for its value rests with the trustee. These words are doubtless merely expressive of the rule of law. The judgment should include interest from the date of the preference.<sup>75</sup> In most cases, the value, *i. e.*, damages, is demanded. This in effect ratifies the title which passed through the preference.<sup>76</sup> Suits to recover the property in specie should only be brought where it can be identified and is found in the hands of the person preferred. If a transfer be made within the four months' period in part for a present consideration and in part payment of an antecedent indebtedness, a recovery may be had for the balance of the value of the property transferred after deducting the value of

<sup>71a</sup>. *Pond v. New York Exchange Bank*, 10 Am. B. R. 343, 124 Fed. 992; *Wall v. Cox*, 5 Am. B. R. 727, 101 Fed. 403.

<sup>72</sup>. *In re Mersman*, 7 Am. B. R. 46. But see *Chism v. Bank*, 5 Am. B. R. 56. See also under Section Forty-seven, ante.

<sup>73</sup>. See Section Nineteen, ante.

<sup>74</sup>. *Crooks v. Bank*, ante; *In re*

*Nelson*, 1 Am. B. R. 63, 98 Fed. 76; *Chism v. Bank*, supra; *Hicks v. Langhorst*, 6 Am. B. R. 178; *Richter v. Nimmo*, 6 Am. B. R. 680; *Martin v. Bigelow*, 7 Am. B. R. 218; *Brown v. Guichard*, 7 Am. B. R. 515.

<sup>75</sup>. *Traders' Nat. Bank v. Campbell*, 14 Wall. 87.

<sup>76</sup>. Compare *Winslow v. Clark*, 47 N. Y. 261.



Subs. c.]

Set-off of a Subsequent Credit.

the present consideration.<sup>76a</sup> Where the preference consists of suffering or permitting a judgment which has become a lien, the trustee has, it is thought, the option of suing under § 60-b or under § 67-e.<sup>77</sup> Though the words "recover the property or its value"<sup>78</sup> do not exactly describe the purpose of such a suit where the transaction amounts to a preference, or the words "recover and reclaim the same by legal proceedings,"<sup>79</sup> the purpose, where the transaction is a fraudulent transfer, the prayer of the bill or complaint may be easily adapted to the circumstances and may be to annul the lien or to recover possession of the property if seized on execution, or otherwise as the facts require. In any event, the pleading should show a demand and refusal to restore.<sup>80</sup>

*Damages.*—If the suit is for value, the judgment, if granted, should be for the worth of the property, not the amount realized under the execution sale by the preferential transferee.<sup>81</sup> He is also entitled to the gross proceeds.<sup>82</sup> Nor can the court allow by way of reduction of damages such amounts as the preferred creditor has paid to other creditors out of the avails of the property transferred.<sup>83</sup> If the latter includes exempt articles, their value cannot be included in the judgment.<sup>84</sup>

*Costs.*—This is regulated by the law and rules of practice applicable to the court where the suit is brought.<sup>85</sup>

### III. Subs. c. SET-OFF OF A SUBSEQUENT CREDIT.

**Prior to Amendments of 1903.**—This subsection which, standing by itself, seems clear enough, was wrenched and twisted and fought over by the bar and the courts in an effort to escape the innocent preference doctrine of *Pirie v. Chicago Title & Trust Co.* The controversy raged about the word "recoverable." The question was whether this had reference to a voidable preference only or

<sup>76a</sup> In re Manning, 10 Am. B. R. 500, 123 Fed. 181.

<sup>77</sup> See In re Adams, 1 Am. B. R. 94; In re Gray, 3 Am. B. R. 647, and, perhaps, § 70-e. See also In re Mersman, 7 Am. B. R. 46.

<sup>78</sup> § 60-b.

<sup>79</sup> § 67-a.

<sup>80</sup> In re Phelps, 3 Am. B. R. 396; Schuman v. Flickenstein, Fed. Cas. 12,826.

<sup>81</sup> Clarion Bank v. Jones, 21 Wall. 325.

<sup>82</sup> Traders' Bank v. Campbell, ante.

<sup>83</sup> North v. House, Fed. Cas. 10,310.

<sup>84</sup> Grow v. Ballard, Fed. Cas. 5,848; Brock v. Terrell, Fed. Cas. 1,914.

<sup>85</sup> Compare Collins v. Gray, Fed. Cas. 3,013.

also to a mere preference in fact. If the former, then subsequent credits after a payment in due course of trade could not be set off, and the creditor not only found the door of the court shut to him if he refused to surrender, but the estate to be distributed increased by his goods sold, perhaps, on the strength of the confidence inspired by such payment. Nothing could be more inequitable. On the other hand, some courts gave a wide meaning to the subsection and declared it applicable even to the technical preference defined in subsection a. The question did not reach the Supreme Court before the amendatory act. The authorities each way are indicated in the foot-note.<sup>86</sup>

**Meaning of Subsection c.**—Nor is it likely now that it will be necessary to determine the question. The cases which attempt to enlarge its meaning all turn on the manifest inequity of doing otherwise. Such inequity no longer exists. Only voidable preferences need now be surrendered. Common sense and syntax connect the word "recoverable" in subsection c with "recover" in subsection b. Standing alone, subsection a is nothing but an explanation or definition of a preference. The latter is not recoverable, unless the element of reasonable cause to believe appears. Only against a preference so recoverable then may subsequent credits granted the debtor be set off. The cases holding this doctrine are thought still in point. The practitioner should, however, note that to entitle to the set-off, the credit must be "in good faith," "without security,"<sup>87</sup> and result in "property which becomes a part of the debtor's estate;" also, that any payments on the new credit must be deducted before the set-off is allowed. If the creditor acted in good faith, extended

<sup>86</sup>. Compare *Kimball v. Rosenham Co.*, 7 Am. B. R. 718; *Morey Mfg. Co. v. Scheffer*, 7 Am. B. R. 670, 114 Fed. 447; *Gans v. Ellison*, 8 Am. B. R. 153, 114 Fed. 734; *Kahn v. Export, etc., Co.*, 8 Am. B. R. 157, 115 Fed. 290; *McKey v. Lee*, 5 Am. B. R. 267, 105 Fed. 923; *In re Ryan*, 5 Am. B. R. 396, 105 Fed. 760; *In re Sechler*, 5 Am. B. R. 579; *In re Southern, etc., Co.*, 6 Am. B. R. 633, 111 Fed. 518; *In re Thompson's Sons*, 6 Am. B. R. 663; affirmed, s. c., 7 Am. B. R. 214, 112 Fed. 651; *In re Soldosky*, 7 Am. B. R. 123, 111 Fed. 511;

with, contra, *In re Christensen*, 4 Am. B. R. 202, 101 Fed. 812; *In re Arndt*, 4 Am. B. R. 773, 104 Fed. 234; *In re Keller*, 6 Am. B. R. 334; *In re Oliver*, 6 Am. B. R. 626, 109 Fed. 784; *In re Steers Lumber Co.*, 6 Am. B. R. 315, 110 Fed. 738; affirmed, s. c., 7 Am. B. R. 332, 112 Fed. 406; *In re Bailey*, 7 Am. B. R. 26; *In re Jones*, 10 Am. B. R. 513, 123 Fed. 128. A summary of cases pro and con will be found in *In re Topliff*, 8 Am. B. R. 241, 114 Fed. 323.

<sup>87</sup>. Compare *In re Tanner*, 6 Am. B. R. 196.

## Subs. d.]

## Preferences to Bankrupt's Attorney.

credit without security, and the money or property actually passed into the debtor's possession, he is entitled to the set-off, and he need not show that the money or property remained in the debtor's possession until his bankruptcy.<sup>87a</sup> The rule stated in this subsection is an extension of that phrased in § 68-a.<sup>88</sup> Here there is not that mutuality of debt required there. Were there, subsection c would be unnecessary.

## IV. Subs. d. PREFERENCES TO BANKRUPT'S ATTORNEY.

**In General.**— Here § 64-b (3), on attorneys' priorities, should also be read. The services referred to in section 64-b (3) are those already rendered, while the services referred to in this subdivision are those "to be rendered," which are paid for in advance "in contemplation of the filing of a petition by or against" the bankrupt. The compensation for the latter services depends both as to payment and amount on the acts of the parties, and what the statute does is to recognize the validity of the payment, but subjects the reasonableness of the amount to the supervision of the court.<sup>88a</sup> The attorney for the bankrupt is entitled to compensation for his services out of the estate.<sup>89</sup> The law gives him the option, either of collecting his compensation in advance or of asking its allowance, as entitled to priority, under § 64-b (3); with, however, this exception, that, if he elects to pursue the former and presumably more tempting method, the court has the power to inquire into the payment and the trustee to recover any excess for the benefit of the estate. This re-examination has been held merely a part of the proceeding and therefore not affected by the now abrogated doctrine that suits to recover preferences must be brought in the state courts.<sup>90</sup> The general subject of the employment and compensation of attorneys is considered elsewhere.<sup>91</sup>

**Practice.**— The practice on proceedings of this character — the attorney being usually an officer of the court — is both simple and

<sup>87a</sup> Kaufman v. Tredway, 12 Am. B. R. 682 (U. S. Sup. Ct.).

<sup>88</sup> See an effort to connect the two in *In re Ryan*, 5 Am. B. R. 396, 105 Fed. 760.

<sup>88a</sup> Furth v. Stahl, 10 Am. B. R.

442, 205 Pa. St. 439; Pratt v. Bothe, 12 Am. B. R. 529, 130 Fed. 670.

<sup>89</sup> For the nature of the services for which he is so entitled, see Section Sixty-two.

<sup>90</sup> *In re Lewin*, 4 Am. B. R. 632.

<sup>91</sup> See under Section Sixty-two.

summary. Being rarely resorted to, there are no stated rules or forms applicable. The amount paid must appear in Schedule B (4) of a voluntary petition. Any notice to the attorney directed by the court is sufficient.<sup>92</sup> The motion may be heard on affidavits or orally. A suit to recover will rarely be necessary; though an order to restore, if not obeyed, is perhaps not now the foundation for a proceeding in contempt.<sup>93</sup>

*Illustrative Cases.*—Cases which have originated under this subsection are collated in the foot-note.<sup>94</sup>

92. In re Lewin, ante.

93. Comingor v. Louisville Trust Co., 184 U. S. 18, 7 Am. B. R. 421. Compare In re Sims, Fed. Cas. 12,888.

94. In re Lewin, ante; In re Kross, 3 Am. B. R. 187, 96 Fed. 816;

In re Goodwin, 2 N. B. N. Rep. 445;

In re Tollett, 2 N. B. N. Rep. 1096;

In re Corbett, 5 Am. B. R. 224, 104

Fed. 872. Compare also, under the law of 1867, In re Sidle, Fed. Cas.

12,844; In re Sims, supra.

## SECTION SIXTY-ONE.

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### DEPOSITORIES FOR MONEY.

§ 61. **Depositories for Money.**— *a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

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**Analogous provisions:** In U. S.: None in the law; but see General Order XXVIII under the law of 1867.

In Eng.: See miscellaneous provisions in General Rules.

**Cross references:** To the law: §§ 12-e; 47-a (3) (4).

To the General Orders: XXIX.

To the Forms: None.

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### I. DEPOSITORIES FOR MONEY.

**Designation of Banks.**— This section is new. Under the law of 1867, the practice was the same, but rested on the authority of a General Order merely.<sup>1</sup> Read in connection with § 47-a (3), the funds of a bankrupt estate can be deposited nowhere else than in one of the designated depositories. The designation of banks is usually made by a standing order of the district court. The depository must give a bond, which should be large enough to cover the amount on deposit at any time.

*Disbursement of Moneys by Depositories.*— This is regulated by General Order XXIX. It is suggested that deposits by trustees be always in the name of, say, "John Doe, as Trustee of Richard Roe,

1. Act of 1867, General Order XXVIII.

## Depositories for Money.

[§ 61.]

in Bankruptcy No. 765.”<sup>1a</sup> Each check should indicate the purpose for which it was drawn. Checks on the funds, if on the clerk’s deposit, must be signed by the latter and countersigned by the judge;<sup>2</sup> if on a trustee’s deposit, must be signed by the latter and countersigned by the referee. A bank which pays a check not so countersigned may do so at its peril.<sup>3</sup> This General Order has been construed somewhat strictly.<sup>4</sup> Perhaps this is wise in exceptional cases. Still, a reasonable observance of proper safeguards against unauthorized withdrawals seems enough.

1a. In re Carr, 9 Am. B. R. 58, 117 Fed. 572. Dividend Check and Receipt, in “Supplementary Forms,” post.

2. Sometimes they take the form of a court order, attested by the clerk. See also Trustees Combined 3. In re Cobb, 7 Am. B. R. 202, 112 Fed. 655.

4. Id.

## SECTION SIXTY-TWO.

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### EXPENSES OF ADMINISTERING ESTATES.

§ 62. **Expenses of Administering Estates.**—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

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**Analogous provisions:** In U. S.: Act of 1867, § 28, R. S., §§ 5099, 5127A, 5127B; Act of 1800, § 29.

In Eng.: Act of 1883, § 73.

**Cross references:** To the law: §§ 39; 47; 64-b (2) (3).

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Expenses of Administering Estates.

Scope of Section.

Priority of Payment.

Practice.

#### II. Employment and Compensation of Attorneys.

In General.

Employment of Attorney for the Trustee.

Compensation of Attorneys.

*For Claimants.*

*For Petitioning Creditors in Involuntary Cases.*

*For Receivers.*

*For Bankrupts in Involuntary Cases.*

*For Bankrupts in Voluntary Cases.*

*For Trustees.*

Effect of Amendments of 1903.

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### I. EXPENSES OF ADMINISTERING ESTATES.

**Scope of Section.**—Clearly the disbursements authorized by this section are (1) the “actual and necessary expenses” (2) incurred

by officers<sup>1</sup> in the administration of estates. These include such disbursements as for service of process, for advertising and giving notices, for perpetuating testimony, for the trustee's bond, for the rent,<sup>2</sup> insurance, and other necessary expenses attending the closing out of a going business, for the fees of the appraisers, and for the compensation of attorneys employed by the trustee. Under the former law, the words were "all necessary disbursements made by him (the assignee) in the discharge of his duty."<sup>3</sup> The close connection between this section and § 64-b is apparent. Indeed, "expenses of administering estates" here seems to be the equivalent of "the cost of administration" in § 64-b (3). For this reason, all so-called "debts entitled to priority" under that subdivision of § 64 are considered in this place.

**Priority of Payment.**— There is nothing either here or in § 64 to indicate the order of payment in case the assets are not sufficient to pay these expenses and the priority debts. Nor has the question yet been squarely up.<sup>4</sup> A fair construction perhaps would be that "expenses of administering" are the same as the "cost of administration" in § 64-b (3), with the result that they will be paid only in case there is sufficient cash on hand to care for (1) taxes, (2) the cost of preserving the estate, and (3) the filing fees paid by creditors.<sup>5</sup> Whether such expenses should be paid ahead of a valid specific lien at the time of the bankruptcy is a question.<sup>6</sup>

**Practice.**— Expenses of administration must be reported in detail under oath, and examined and approved by the court. Where the allowance is for the compensation of the trustee's attorney, he should always file an affidavit specifying the services performed. But such an allowance may be made without a notice to creditors.<sup>7</sup> As a rule, all disbursements by the trustee are itemized in his verified reports, and formally allowed on the coming up of such reports for confirmation.

1. § 1 (18); *Wilson v. Penn., etc.*, Co., 8 Am. B. R. 169, 114 Fed. 742.

2. Consult *In re Wiessner*, 8 Am. B. R. 415.

3. § 28, R. S., § 5099.

4. Note *In re Burke*, 6 Am. B. R. 502.

5. See § 64-a, b (1) (2).

6. *In re Frick*, 1 Am. B. R. 719. Contra, *In re Tebo*, 4 Am. B. R. 235, 101 Fed. 419.

7. *In re Stoltz*, 1 Am. B. R. 641, 93 Fed. 438. Compare *In re Brinker*, Fed. Cas. 1,882.



## II. EMPLOYMENT AND COMPENSATION OF ATTORNEYS.

**In General.**—§ 62 strictly only has to do with disbursements by the attorney for the trustee.<sup>8</sup> For convenience, the whole subject of attorneys and their compensation is, however, discussed here.<sup>9</sup>

**Employment of Attorney for the Trustee.**— This is carefully regulated by statute in England; and the law there, being expressive of the experience of centuries, may be consulted with profit. The reported cases under the law of 1867, while not numerous, are valuable.<sup>10</sup> Under the present law, it has been held that the trustee's attorney may be chosen by the creditors, in the same way the trustee is chosen;<sup>11</sup> he should, however, be satisfactory to the trustee. Also, that the attorney should not have been the attorney for the bankrupt,<sup>12</sup> or for an interest adverse to the general creditors.<sup>13</sup>

**Compensation of Attorneys.**— An attorney's right to compensation is incident to his employment. Whether it shall be paid out of the assets of a bankrupt estate is the question considered here. It has been held that, under § 64-b (3), the attorneys for the petitioning creditors and for the bankrupt in involuntary cases have an absolute right to compensation;<sup>14</sup> the amount only is discretionary. It is suggested, however, that the clause "as the court may allow" has relation to all the words of the subdivision and not merely to the clause "and to the bankrupt in voluntary cases."<sup>14a</sup> Such a view would harmonize the statute and the practice under it. But this discretion must be sound and not unrestrained; it is subject to review.<sup>15</sup>

8. Compare § 64-b (3). As to the compensation of attorneys for general assignees, paid them prior to bankruptcy, see *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 7 Am. B. R. 421; *In re Klein & Co.*, 8 Am. B. R. 559, 116 Fed. 523. Compare *In re Mays*, 7 Am. B. R. 764, 114 Fed. 600.

9. Act of 1883, § 73 (3) (4).

10. For instance: *In re Drake*, Fed. Cas. 4,058; *In re Davenport*, Fed. Cas. 3,587; *In re Noyes*, Fed. Cas. 10,371. For an order of appointment under the present law, see "Supplementary Forms," post.

11. *In re Smith*, 1 Am. B. R. 37; *In re Little River Lumber Co.*, 3 Am. B. R. 682, 101 Fed. 558. Contra. *In re Abram*, 4 Am. B. R. 575, 103 Fed. 272. See also *In re Arnett*, 7 Am. B. R. 522, 112 Fed. 770.

12. *In re Teuthorn*, 5 Am. B. R. 767.

13. *In re Rusch*, 5 Am. B. R. 565, 105 Fed. 607; *In re Kelly Dry Goods Co.*, 4 Am. B. R. 528, 102 Fed. 747.

14. *In re Curtis*, 4 Am. B. R. 17, 100 Fed. 784, approved and followed in *Smith v. Cooper*, 9 Am. B. R. 755 (C. C. A.), 120 Fed. 230. Compare *In re Smith*, 5 Am. B. R. 559, 108 Fed. 39.

14a. *In re Morris*, 11 Am. B. R. 145, 125 Fed. 841; *In re Kross*, 3 Am. B. R. 189, 96 Fed. 816.

15. *In re Curtis*, supra; *In re Burrus*, 3 Am. B. R. 296, 97 Fed. 926; *Smith v. Cooper*, 9 Am. B. R. 755, 120 Fed. 230. But it will not usually be disturbed; *In re Tebo*, 4 Am. B. R. 235, 101 Fed. 419. Still

Whether compensation shall be allowed depends on the facts of each case.<sup>16</sup> Neither the attorney for petitioning creditors in involuntary bankruptcy proceedings, nor the attorney for the bankrupt, can be allowed compensation out of a fund derived from the sale of property under mortgage foreclosure proceedings, where it appears that such bankruptcy proceedings were of no benefit to the mortgagees.<sup>16a</sup> Compensation cannot be allowed save for "professional services actually rendered." Additional precedents will be found under the appropriate paragraphs, *post*.

*For Claimants.*—Attorneys for mere claimants are not entitled to allowances out of the estate;<sup>17</sup> not even attorneys for the petitioning creditors for services after the appointment of the trustee,<sup>18</sup> nor attorneys for creditors who object to the allowance of claims of other creditors.<sup>18a</sup> But where the trustee has refused or neglected to recover assets or resist a questionable claim, and individual creditors do this for the benefit of all, their attorneys will be allowed compensation for so doing.<sup>19</sup>

*For Petitioning Creditors in Involuntary Cases.*—This allowance is customary. The amount depends on a variety of circumstances, unnecessary to enumerate here. If the petition results in an adjudication by default, \$75 and disbursements has been thought a proper allowance.<sup>20</sup> In an important case, an allowance of \$12,500 was cut down by the Circuit Court of Appeals to \$2,000.<sup>21</sup>

*For Receivers.*—The rules applicable to the compensation of attorneys for the trustee apply also to those who serve receivers.<sup>22</sup>

*For Bankrupts in Involuntary Cases.*—Here the statute limits compensation to services rendered to the bankrupt while performing the duties put on him by the act.<sup>23</sup> There has been some discussion

see *In re Carr*, 8 Am. B. R. 635, 116 Fed. 556.

16. See *In re Evans*, 8 Am. B. R. 730 (and modification on rehearing in foot-note), 116 Fed. 909.

16a. *In re Goldville Mfg. Co.*, 10 Am. B. R. 552, 118 Fed. 892.

17. *In re Smith*, 5 Am. B. R. 559, 108 Fed. 39.

18. *In re Silverman*, 3 Am. B. R. 227, 97 Fed. 325.

18a. *Matter of Fletcher*, 10 Am. B. R. 398. See *In re Worth*, 12 Am. B. R. 566.

19. *In re Groves*, 2 N. B. N. Rep. 466; *In re Little River Lumber Co.*, ante.

20. *In re Woodard*, 2 Am. B. R. 692, 95 Fed. 955; *In re Silverman*, supra. Compare *In re Harrison Mechanical Co.*, 2 Am. B. R. 419, 95 Fed. 123; also *In re Ghiglione*, 1 Am. B. R. 580, 93 Fed. 186.

21. *In re Curtis*, 4 Am. B. R. 17, 100 Fed. 784.

22. See "For Trustees," in this Section, *post*.

23. See § 7, ante; also *In re Woodard*, supra.

§ 62.]

For Bankrupts in Voluntary Cases.

as to the meaning of the words.<sup>24</sup> Where there are separate attorneys for different partnership bankrupts but one allowance should be made.<sup>25</sup> The test seems to be: did the performance of the prescribed duties materially benefit or hasten the administration of the estate,<sup>25a</sup> and, if so, were the services of the bankrupt's attorney both necessary and instrumental to either of those ends?

*For Bankrupts in Voluntary Cases.*—Here the cases take a wide range. The allowance itself and the amount are both discretionary. It has been held on the one hand that the attorney for the bankrupt is merely a general creditor entitled to dividends,<sup>26</sup> and, on the other, that he is entitled to an allowance for all services to the bankrupt during the proceeding, whether beneficial to the estate or not, even those connected with the discharge; and, in addition, to priority of payment.<sup>27</sup> The safer rule is that the bankrupt's attorney is only entitled to compensation out of the estate for services, which, though performed for the bankrupt, are really "in aid of the estate and its administration."<sup>28</sup> This excludes services in connection with the discharge,<sup>29</sup> and, it is thought, save in exceptional instances, everything done after the appointment of the trustee. It is well settled, too, that, where the bankrupt's attorney has received compensation from the bankrupt or any one else shortly before the bankruptcy and the amount is as much as he would have been allowed in the proceeding, no further sum should be paid.<sup>30</sup> The allowance in voluntary cases is usually to cover services in drawing the petition and schedules and until the first meeting of creditors, and should be moderate, rather than the opposite.<sup>31</sup>

*For Trustees.*—The fees of the attorney for the trustee are strictly an expense of administration and are payable as provided

24. See foot-notes of next paragraph, where the cases in both voluntary and involuntary bankruptcy are collated.

25. In re Eschwege, 8 Am. B. R. 282.

25a. In re Goldville Mfg. Co., 10 Am. B. R. 552, 118 Fed. 892; In re Rosenthal, 9 Am. B. R. 626, 120 Fed. 848.

26. In re Beck, 1 Am. B. R. 535, 92 Fed. 889.

27. In re Kross, 3 Am. B. R. 187, 96 Fed. 816.

28. In re Mayer, 4 Am. B. R. 238,

101 Fed. 695, 697; In re Terrill, 4 Am. B. R. 625, 103 Fed. 781; In re Anderson, 4 Am. B. R. 640, 103 Fed. 854.

29. In re Brundin, 7 Am. B. R. 296, 112 Fed. 306; In re Averill, 1 N. B. N. 544. See also Ex parte Hale, Fed. Cas. 5,910.

30. In re O'Connell, 3 Am. B. R. 422, 98 Fed. 83; In re Smith, 5 Am. B. R. 559, 108 Fed. 39. Compare In re Goodwin, 2 N. B. N. Rep. 445.

31. Compare In re Carolina Cooperation Co., 3 Am. B. R. 154, 96 Fed. 950.

in this section.<sup>32</sup> It was held early in the administration of the present law that a trustee who was also an attorney could be allowed the same fees that would have been paid to other competent counsel.<sup>33</sup> This may be doubted, the trustee's fee being limited by § 48 and General Order XXXV (3).<sup>34</sup> The amount of the allowance depends on a variety of circumstances, as: the time employed, the difficulty of the legal questions involved, the result achieved, the amount at stake, and the size of the estate;<sup>35</sup> but a trustee should not be allowed for services which a business man, with the help of the Supreme Court forms, could himself perform,<sup>36</sup> or for those rendered before the appointment of the trustee.<sup>37</sup> The allowance should be moderate, rather than large.<sup>38</sup> It is, it seems, always discretionary. Allowances should not be made until the services are rendered, or, usually, until the final meeting of creditors. Where the service has been unusual or protracted or the amount asked for is large in proportion to the estate, a notice to creditors of the intention to apply, is good practice,<sup>39</sup> though doubtless not essential. The trustee is entitled upon an accounting to amounts reasonably expended by him for the services of an attorney, made necessary for the preservation of the estate which had been assigned to him as assignee for creditors prior to his appointment as trustee.<sup>39a</sup>

**Effect of Amendments of 1903.**—Generally speaking, the policy of the law as amended as to attorneys' allowances is, perhaps, more liberal than was that of the original act.<sup>40</sup> Within proper limits, such a tendency is in aid of administration. The courts may be relied on to check any effort to carry it too far. The amendment of § 64-b (2) should also be read in this connection. It is in line with the practice as previously established in some of the districts.<sup>41</sup>

32. *In re Burke*, 6 Am. B. R. 502; *In re Stolls*, 1 Am. B. R. 641.

33. *In re Mitchell*, 1 Am. B. R. 687.

34. Compare *In re Muldaur*, Fed. Cas. 9,905.

35. *In re Knight*, 5 Am. B. R. 560; *In re Burrus*, ante. Compare also, for an attempt to establish compensation on a sliding scale basis, *In re Smith*, 2 Am. B. R. 648. See also *In re Drake*, ante; *In re Noyes*, ante; *In re Treadwell*, 23 Fed. 442.

36. *In re Knight*, ante.

37. *In re N. Y. Mail Steamship Co.*, Fed. Cas. 10,210.

38. Compare *In re Knight*, ante, with *In re Curtis*, ante. See also *In re Davenport*, ante; *In re Cook*, 17 Fed. 328.

39. Consult *In re Arnett*, 7 Am. B. R. 522, 112 Fed. 770; also *Ex parte Whitcomb*, Fed. Cas. 17,529; *In re Colwell*, ante.

39a. *In re Byerly*, 12 Am. B. R. 186, 128 Fed. 637. See also *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1.

40. Compare §§ 2 (3), 40, 48.

41. See foot-note 19, ante.

## SECTION SIXTY-THREE.

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### DEBTS WHICH MAY BE PROVED.

§ 63. **Debts which may be Proved.**—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

*b* Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

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**Analogous provisions:** In U. S.: *As to provable debts in general*, Act of 1867, § 19, R. S., § 5067; Act of 1841, § 5; Act of 1800, § 39; *As to unliquidated claims*, Act of 1867, § 19, R. S., § 5067; *As to contingent claims*, Act of 1867, § 19, R. S., § 5068; Act of 1841, § 5; Act of 1800, § 39; *As to surety debts*, Act of 1867, § 19, R. S., §§ 5069, 5070.

In Eng.: Act of 1883, § 37.

**Cross references:** To the law: §§ 1 (11); 5; 11-a; 17; 57; 59-b; 64-b; 65-a; 68.

To the General Orders: XXI.

To the Forms: Nos. 31, 32, 33, 34, 35, 36, 37.

## SYNOPSIS OF SECTION.

**I. Provable Debts.**

History and Comparative Legislation.

In General.

*"Proved" and "Allowed."**Ex Contractu and Ex Delicto.**The Debt Must have Existed When the Petition was Filed.**Changes in Form of Debt after Filing of the Petition.**Equitable Debts.**Debts Against More than One Person.**Provability as Affected by Person Proving.**Provability as Affected by Fraud or Preference.**Provability of Secured Debts.**Provability of Priority Debts.**Partnership Debts.**Miscellaneous Cases.*

Cross References.

**II. What Debts Are Provable.**

Subs. a (1). A Fixed Liability, Absolutely Owning.

*Debts Not yet Due.**Evidenced by a Judgment.**Impeaching Judgments.**Evidenced by an Instrument in Writing.**Indorser and Surety Debts.*

Subs. a (2). Founded on Open Account.

Subs. a (3). Founded on a Contract, Express or Implied.

*Continuing Contracts.**Implied Contracts.*

Subs. a (4). Founded on Judgments Entered after Bankruptcy.

Subs. a (5). Costs Against an Involuntary Bankrupt.

Subs. a (6). Costs Incurred in Good Faith in an Action to Recover a Provable Debt.

Subs. b. Unliquidated Claims.

*Contingent Liabilities.***III. What Debts Are Not Provable.**

In General.

*Judgments for Fines.**Alimony Due or to Accrue.**Rent to Accrue.**Debts Outlawed by a Statute of Limitations.*

Cross References.

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**I. PROVABLE DEBTS.**

History and Comparative Legislation.—A clear understanding of what is a provable debt is important to either the due administration

of, or practice under, all bankruptcy laws. If provable, a debt is the basis of its owner's right to a *pro rata* share in the estate; if provable, with certain exceptions, always stated in the statute,<sup>1</sup> it is barred by the discharge. The earlier statutes were inclined to go far afield in defining such debts. Of late, the tendency has been to make the phrasing generic, and leave its construction to the courts. Thus, the present English law, after excepting all "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust," in substance declares provable: "all debts and liabilities, present or future, certain or contingent."<sup>2</sup> The same tendency is apparent in the United States. Section 19 of the law of 1867 was phrased in greater detail than § 63 of the present statute.<sup>3</sup> Much of it was expressive of existing rules of law; these are unquestionably still in force, even though omitted from the Act of 1898. The omission of other provisions, not expressive of general rules, seems to warrant the view that, having been dropped out, they are no longer the law. These differences are considered in appropriate paragraphs, *post*.

**In General.**— Subdivision a indicates those "debts" that are provable; subdivision b those debts which, because unliquidated at the time of the petition, are not immediately provable, but may be when liquidated. "Debt" and "liability" are here used somewhat loosely. The definition of the former in § 1 (11) seems hardly applicable, as it results in the truism: a debt is a debt. The tendency of

1. See § 17.

2. Act of 1883, § 37.

3. The differences between the two statutes in this particular are tersely stated in a previous edition, as follows (3d ed., p. 380):

"The following are the most important differences: first, omission from the present act of any express provision authorizing the proving of contingent debts and liabilities, or the liability of the bankrupt as surety, indorser, or guarantor; second, omission of any express provision as to the proving of damages resulting from a conversion or trespass by the bankrupt; third, omission of any express provision as to the apportionment of rent and proving for the same; fourth, the embodiment in the

present act of an express provision as to proving a judgment recovered after the commencement of proceedings in bankruptcy upon a debt at that time provable; fifth, the embodiment of an express provision making costs incurred by the bankrupt in certain suits by and against him provable debts; sixth, the embodiment of a provision that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such a manner as it shall direct, and may thereafter be proved and allowed against the bankrupt's estate; seventh, the lack of any general provision as to the time when a debt must have become fixed and owing in order to be provable."

the courts has been to give a somewhat narrow meaning to the word.<sup>4</sup> Strictly, a debt is "something owed." Here this is immaterial; the five subdivisions indicate the only obligations of the debtor which are, strictly speaking, provable.

"*Proved*" and "*Allowed*."—In this connection, it is important to recall the difference between a debt which may be proved and one which may be allowed. Generally speaking, every claim on which an action in law or in equity might have been maintained may be proved;<sup>5</sup> whether a debt so proved will be allowed is decidedly another matter. This distinction is perhaps somewhat artificial, the words "proved and allowed" being in § 63 yoked together and their equivalency to "provable" apparently taken for granted.<sup>6</sup> When applied to § 59-b, this seems necessary, for a fraudulent or preferred creditor should not, without a surrender of his advantage, be permitted to file a petition against a debtor merely because his debt might be "proved."<sup>7</sup> The term "provable debt" is not limited in its meaning to a debt against the allowance of which no defense can be successfully interposed; so where a claim is disallowed for the reason that it was barred by the statute of limitations it is nevertheless a provable debt, so far at least as the bankrupt's discharge therefrom is concerned.<sup>7a</sup>

*Ex Contractu and Ex Delicto*.—Liabilities grounded in contract are, almost without exception, provable. So also are judgments grounded in tort. Whether mere liabilities *ex delicto* may be liquidated and thus become provable, is still a question. Under the former law, such claims if "on account of any goods or chattels wrongfully taken, converted or withheld," *i. e.*, if in conversion, were provable, but only after being duly liquidated.<sup>8</sup> With the single exception next noted, other liabilities sounding in tort were not.<sup>9</sup> Debts created by the fraud or embezzlement of the bankrupt were, by the terms of another section, made provable, but were also declared not dischargeable.<sup>10</sup> Even the clause above quoted has been omitted

4. In *re* Sutherland, Fed. Cas. 13,639; In *re* Foye, Fed. Cas. 5,021; *Wilson v. Bank*, 3 Fed. 391.

5. See In *re* Jordan, 2 Fed. 319.

6. Note that the words "provable debts" occur in § 17, and the words "provable claims" in § 59-b.

7. The meaning of "proved" is indicated in § 57-a, c, d.

7a. *Hargadine, etc., Dry Goods Co. v. Hudson*, 10 Am. B. R. 225, 122 Fed. 232, affirming 6 Am. B. R. 657.

8. § 19, R. S., § 5067; In *re* Bailey, Fed. Cas. 729; In *re* Hennocksburgh, Fed. Cas. 6,367; *Weaver v. Voils*, 68 Ind. 191.

9. In *re* Schuchardt, Fed. Cas. 12,483; *Gilman v. Cate*, 63 N. H. 278.

10. § 33, R. S., § 5117.



from the present law; the same is silent as to the provability of debts in fraud or for embezzlement. Hence, the argument that such mere liabilities are not provable. But, strictly, debts grounded in tort are as much liabilities as are those entirely *ex contractu*, and a distinction between those actually liquidated at the time the petition is filed and those which may be is somewhat artificial.<sup>11</sup> Besides, § 17 now excepts from dischargeable debts many "provable debts" that are unliquidated torts; the words "judgments in actions" in § 17-a (2) having now given place to the word "liabilities." It would seem, therefore, that liabilities for torts *per se*, and not merely those provable on the theory of quasi-contract,<sup>12</sup> may now be liquidated and proven and allowed, at least all those that are both *in praesenti* debts (as distinguished from fines or duties)<sup>13</sup> and are excepted from the effect of a discharge by § 17. The Supreme Court has recently held that subdivision a of this section, defining provable debts, must be read in connection with § 17 limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity; and that, therefore, if a debt originates, or is "founded upon an open account, or upon a contract, expressed or implied," it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover, as for a fraudulent conversion, instead of in assumpsit for a balance due upon an open account.<sup>13a</sup>

*The Debt Must have Existed When the Petition was Filed.*—Here the statute is not entirely harmonious. Subs. a (4), unlike the other subdivisions, has no words of time. That the rule stated at the head of this paragraph applies to it cannot, however, be doubted.<sup>14</sup>

11. On the other hand, it is, of course, true that much practical inconvenience would result from the doctrine stated in the text. Consult Section Seventeen. See also the limitation of the English statute to unliquidated damages "by reason of a contract, promise, or breach of trust;" Act of 1883, § 37.

12. See *In re Hirschman*, 4 Am. B. R. 715, 104 Fed. 69, and *In re Filer*, 5 Am. B. R. 582, for the prevailing rule before the amendatory

act of 1903. And compare *In re Lazarovic*, 1 Am. B. R. 476, and *In re Cushing*, 6 Am. B. R. 22.

13. For instance: fines for crimes, alimony, and rent to accrue.

13a. *Crawford v. Burke*, 12 Am. B. R. 659, reversing 201 Ill. 581.

14. For instance, see *In re Garlington*, 8 Am. B. R. 602, 115 Fed. 999; *In re Adams*, 12 Am. B. R. 368, 130 Fed. 381, holding that a creditor cannot prove for an indebtedness arising between the filing of an involun-

*Changes in Form of Debt after Filing of the Petition.*—This subject is considered *sub nom.* "Founded on Judgment Entered after Bankruptcy."<sup>15</sup>

*Equitable Debts.*—It has always been the law in England that equitable demands may be proved in bankruptcy.<sup>16</sup> Cases under the former law to the same effect are numerous.<sup>17</sup> There are no cases strictly in point under the present act; but that the same rule applies has not been questioned.

*Debts Against More than One Person.*—The rights of a creditor who has a claim against a partnership and the individuals composing it have already been considered.<sup>18</sup> Where the obligation is that of maker and indorser, the holder has a provable debt against both.<sup>19</sup> Likewise, where several debtors are jointly liable. The test is: could the claimant have maintained an action against the bankrupt?

*Provability as Affected by the Person Proving.*—An assignee of the creditor has a provable debt if his assignor had, even if the assignment post-dates the bankruptcy.<sup>20</sup> But where the creditor is a debtor of the bankrupt in a larger sum than the amount claimed, such claim is not provable.<sup>21</sup> Where the common-law disability of the wife has been abolished by statute, she may have a provable debt against her husband's estate,<sup>22</sup> even if a statute prohibits a suit by

tary petition and the adjudication of his debtor as a bankrupt; In re Co-burn, 11 Am. B. R. 212, 126 Fed. 218. Compare In re Bingham, 2 Am. B. R. 223, 94 Fed. 796; In re Reliance, etc., Co., 4 Am. B. R. 49, 100 Fed. 619; In re Swift, 7 Am. B. R. 374, 112 Fed. 315, affirming s. c., 5 Am. B. R. 335, 105 Fed. 493; In re Crawford, Fed. Cas. 3,363; In re Ward, 12 Fed. 325; In re Merrell, 19 Fed. 874; Fowler v. Kendall, 44 Me. 448.

15. Compare also In re Montgomery, Fed. Cas. 9,730, which, however, is probably no longer in point. It would seem that the giving of a note after the petition, in renewal of one given before it, now gives the holder the option of (a) surrendering it and proving on the debt, or (b) treating it as a new obligation.

16. Ex parte Yonge, 3 Ves. & B. 31; Ex parte Williamson, 2 Ves. 252; Ex parte Dewdney, 15 Ves. 479.

17. For instance: Sigsby v. Willis,

Fed. Cas. 12,849; In re Blandin, Fed. Cas. 1,527; In re Buckhause, Fed. Cas. 2,086.

18. See under Section Five, ante, and, for limitations on the doctrine there stated, see Lamoile, etc., Bank v. Stevens' Estate, 6 Am. B. R. 164, 107 Fed. 245, and Shattuck v. Bugh, 6 Am. B. R. 56.

19. Compare *sub nom.* "Indorser and Surety Debts," in this Section, post.

20. In re Goodwin Shoe Co., 3 Am. B. R. 200; In re Murdock, Fed. Cas. 9,939; In re Pease, Fed. Cas. 10,880. For method of proving assigned claims, see under Section Fifty-seven, ante.

21. In re Gerson, 5 Am. B. R. 850.

22. In re Novak, 4 Am. B. R. 311, 101 Fed. 800; Hawk v. Hawk, 4 Am. B. R. 463, 102 Fed. 679; In re Neiman, 6 Am. B. R. 329, 109 Fed. 113. This is not the rule in Massachusetts: In re Talbot, 7 Am. B. R. 29,

her against her husband;<sup>22a</sup> but her claim is usually looked on with suspicion.<sup>23</sup> Under a statute conferring upon a married woman the same powers in respect to her property as if she were unmarried, it has been held that a contract to pay for a wife's services is not a provable debt,<sup>23a</sup> and under a statute giving to a married woman her individual earnings "except those accruing from labor performed for her husband, or in his employ, or payable by him," the wife's claim for wages earned as bookkeeper in her husband's store is not provable.<sup>23b</sup> If still a *feme covert*, a wife who is bankrupt may allege her coverture as a defense and prevent proof.<sup>24</sup> An alien creditor may prove a claim. Other instructive cases on this general subject, in particular those where the creditor is the customer of a stockbroker, will be found in the foot-note.<sup>25</sup>

*Provability as Affected by Fraud or Preference.*—Here there is some confusion owing to doubt as to the exact meaning of "provable."<sup>26</sup> Since the amendment of § 57-g by the act of 1903, there can be little doubt; all preferences and the more common frauds, both constructive and in fact, being voidable. If the transaction upon which the debt is based was fraudulent as against the other creditors it is not provable.<sup>26a</sup> In short, if the fraud may be attacked under either § 60-b or § 67-e, the debt clearly is now not provable until the claimant surrenders his advantage. If the creditor compels the trustee to recover, the claim, because shorn of fraud, as it were, by force, continues not provable. The numerous cases under the former law are probably no longer in point.<sup>27</sup> So also of some of those under the new, prior to the amendatory act.<sup>28</sup>

110 Fed. 924. But see *In re Nickerson*, 8 Am. B. R. 707, 116 Fed. 1003.

<sup>22a</sup> *In re Domenig*, 11 Am. B. R. 552.

<sup>23</sup> So also of a child's claim for alleged services rendered a bankrupt father. *In re Brewster*, 7 Am. B. R. 486.

<sup>23a</sup> *In re Kaufmann*, 5 Am. B. R. 104, construing section 21 of the New York Domestic Relations Law.

<sup>23b</sup> *In re Winkel*, 12 Am. B. R. 696, construing section 2343 of the Revised Statutes of Wisconsin, 1898.

<sup>24</sup> *In re Goodman*, Fed. Cas. 5,540.

<sup>25</sup> *In re Ervin*, 6 Am. B. R. 356, 109 Fed. 135; affirmed as *Wallerstein v. Ervin*, 7 Am. B. R. 256; also *In re*

*Ervin*, 7 Am. B. R. 480, 114 Fed. 596; *In re Clark*, 7 Am. B. R. 96,

111 Fed. 893; *In re Swift*, 5 Am. B. R. 415, 106 Fed. 65; affirmed, s. c., 7 Am. B. R. 374, 112 Fed. 315; *In re Graff*, 8 Am. B. R. 744, 117 Fed. 343.

<sup>26</sup> *In re Owings*, 6 Am. B. R. 454, 109 Fed. 623. Contra, *In re Richard*, 2 Am. B. R. 507, 94 Fed. 633.

<sup>26a</sup> *In re Lansaw*, 9 Am. B. R. 167, 118 Fed. 365.

<sup>27</sup> For instance: *In re Black*, Fed. Cas. 1,459; *In re Schwartz*, Fed. Cas. 12,502; *In re Arnold*, Fed. Cas. 551; *In re Rundle et al.*, Fed. Cas. 12,138.

<sup>28</sup> *In re Lazarovic*, 1 Am. B. R. 476; *In re Norcross*, 1 Am. B. R. 644.

*Provability of Secured Debts.*—This is considered elsewhere.<sup>29</sup>

*Provability of Priority Debts.*—Compare here Section Sixty-four, *post*.

*Partnership Debts.*—This subject is discussed under Section Five, *ante*.

*Miscellaneous Cases.*—Valuable cases under the present law, not cited elsewhere in this Section, will be found in the foot-note.<sup>30</sup>

**Cross-References.**—In addition to the references in the preceding paragraphs, the practitioner will find much that bears on the provability of debts under Section Seventeen. He should also have in mind the doctrine of set-off, discussed in Section Sixty-eight.

## II. WHAT DEBTS ARE PROVABLE.

**Subs. a (1). A Fixed Liability, Absolutely Owing.**—Having considered this section generally, it becomes necessary to examine its words. In the former law, the words were: “debts \* \* \* existing.” The words “fixed liability, absolutely owing” would, therefore, be an unfortunate limitation were it not for the broader words of subdivision (4).<sup>31</sup>

*Debts Not Yet Due.*—These words of the statute characterize the debt rather than the time of payment. To be provable under subdivision (1), a debt must be a fixed liability absolutely owing at the time the petition is filed; but the time of payment is immaterial.<sup>32</sup> This statutory provision is further emphasized by the provision for the allowance of interest to or a rebate of interest after the date of bankruptcy.<sup>33</sup> This phrasing has been most discussed in considering the provability of a contract of indorsement not fixed by default and protest until after the petition was filed.<sup>34</sup> It has also been well considered in connection with a bond to secure an annuity.<sup>35</sup> Likewise, when the contract was one of yearly employment.<sup>36</sup> Indeed,

<sup>29</sup>. See under Section Fifty-seven, *ante*.

<sup>30</sup>. In re Wright, 2 Am. B. R. 592, 95 Fed. 807; In re Heinsfurter, 3 Am. B. R. 109, 97 Fed. 198; Hill v. Levy, 3 Am. B. R. 374, 98 Fed. 94; In re Knox, 3 Am. B. R. 371, 98 Fed. 585; In re Fife, 6 Am. B. R. 258, 109 Fed. 880; In re Upson, 10 Am. B. R. 602, 123 Fed. 807.

<sup>31</sup>. See sub nom. “Founded on

Contract, Express or Implied,” in this Section, *post*.

<sup>32</sup>. In re Swift, *ante*.

<sup>33</sup>. Compare, for similar words, Act of 1867, § 19, R. S., § 5067.

<sup>34</sup>. See “Indorser and Surety Debts,” *post*.

<sup>35</sup>. Cobb v. Overman, 6 Am. B. R. 324, 109 Fed. 65, reversing Bray v. Cobb, 3 Am. B. R. 788.

<sup>36</sup>. In re Silverman Bros., 4 Am.

## Subs. a.] Evidenced by Judgment; Impeaching Judgments.

the words "absolutely owing" seem to have been a stumbling block in the lower courts; the upper courts have found more equity in the words "founded \* \* \* upon contract, express or implied" in subdivision (4).<sup>37</sup>

*Evidenced by a Judgment.*—It follows from the language of the section that, with the rare exception noted later, all judgments actually entered at the date of the bankruptcy are provable debts. But the rendering of a verdict is not, it seems, a judgment entitling such verdict to proof.<sup>38</sup> This doctrine has not been strictly observed where the application was for an injunction to prevent the arrest of the bankrupt or injury to his estate.<sup>39</sup> If the judgment has resulted in a void or voidable lien, because within four months of the bankruptcy, it is still a provable debt, the lien only being affected.<sup>40</sup> Indeed, it seems, the debt on which the judgment was founded, if otherwise provable, may be proved in its stead. A judgment is provable, even if an appeal has been taken thereon, but dividends on it should be withheld.<sup>41</sup> A claim evidenced by a judgment recovered more than ten years prior to bankruptcy is not provable, unless renewed as required by statute.<sup>42</sup>

*Impeaching Judgments.*—Here the English doctrine is much broader than our own.<sup>43</sup> Full faith and credit being necessarily given to the judgments of the state courts when pleaded in the federal courts, it was, under the former law, held that a judgment of a state court could not be impeached when presented as a claim in bankruptcy, but resort must be had to the state court.<sup>44</sup> That it is conclusive between the bankrupt and the judgment creditor is elementary. But where the rights of general creditors have intervened, the English rule that such a judgment is but *prima facie* evidence

B. R. 83, 101 Fed. 219, reversing s. c., 2 Am. B. R. 15.

37. See sub nom. "Continuing Contracts," in this Section, post.

38. Black v. McClelland, Fed. Cas. 1,462.

39. For instance: See In re Lewensohn, 3 Am. B. R. 596, 99 Fed. 73; In re Cole, 5 Am. B. R. 780, 108 Fed. 837, and In re Sullivan, 2 Am. B. R. 30. And examine In re Fife, 6 Am. B. R. 258, 109 Fed. 880.

40. See Section Sixty-seven of this work.

41. Compare In re Yates, 8 Am. B. R. 69, 114 Fed. 365; In re Sheehan, Fed. Cas. 12,737.

42. In re Farmer, 9 Am. B. R. 19, 116 Fed. 763.

43. See In re Phelps, 3 Am. B. R. 434; affirmed on review, without opinion, and cases cited.

44. In re Campbell, Fed. Cas. 2,349; McKinsey v. Harding, Fed. Cas. 8,866; In re Burns, Fed. Cas. 2,182. Contra, Ex parte O'Neil, Fed. Cas. 10,527.

of a provable debt is fairer. The law in the United States seems, however, to be that the trustee or a creditor may attack it in the bankruptcy proceeding for fraud or collusion, but not otherwise.<sup>45</sup> A judgment not regular on its face, or by a court which did not have jurisdiction of the subject-matter, may of course be attacked anywhere; but jurisdiction need not affirmatively appear,<sup>46</sup> nor can the recitals of the judgment, as a rule, be contradicted in a collateral proceeding.

*Evidenced by an Instrument in Writing.*—To be provable under this subdivision, a debt, if not in judgment, must rest on an instrument in writing. This means any document or written evidence of the agreement whence the debt arises. Collection fees stipulated to be paid in a promissory note due before the filing of the maker's petition in bankruptcy, but which was not placed in the hands of an attorney for collection until after such time, are not absolutely owing at the time of the filing of the petition and are not provable.<sup>46a</sup>

*Indorser and Surety Debts.*—The present statute contains no equivalent to § 5069 of the Revised Statutes;<sup>47</sup> and it was for some time doubted whether an indorser whose liability became fixed after the bankruptcy could prove against the bankrupt's estate.<sup>48</sup> It is now thought that, in spite of this omission and the persuasive argument based on the harmonies of the statute, *contra*,<sup>49</sup> such liabilities, because on "contract, express or implied," are provable. The rules of law applicable when the indorser or surety is already liable for a debt of the bankrupt have been considered.<sup>50</sup> His claim is in no sense contingent, for he proves the fixed liability of the bankrupt to the principal debtor. But where such person is merely an accom-

45. See *Candee v. Lord*, 2 N. Y. 269. And compare *Hassell v. Wilcox*, 130 U. S. 493.

46. In re *Columbia Real Estate Co.*, 4 Am. B. R. 411, 101 Fed. 965.

46a. In re *Keaton*, 11 Am. B. R. 367, 126 Fed. 426; s. c. 11 Am. B. R. 370, 126 Fed. 429; In re *Garlington*, 8 Am. B. R. 602. But if the services of an attorney in the collection of such a note had been performed prior to the filing of the petition the fees stipulated to be paid would have been provable as a debt against the estate of the bankrupt. *Merchants' Bank v.*

*Thomas*, 10 Am. B. R. 299, 121 Fed. 306.

47. Act of 1867, § 19.

48. See In re *Schaefer*, 5 Am. B. R. 92, as overruled by the same judge in In re *Gerson*, 5 Am. B. R. 89, 105 Fed. 891; the later ruling affirmed, s. c., 6 Am. B. R. 11. See also In re *Marks*, 6 Am. B. R. 641.

49. Thus, see *Collier on Bankruptcy*, 3d ed., pp. 382, 383.

50. See Sections Sixteen and Fifty-seven. Compare In re *Smith*, 1 Am. B. R. 37; *Smith v. Wheeler*, 5 Am. B. R. 46; *Hayer v. Comstock*, 7 Am. B. R. 493.

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Subs. a.]                      Founded on a Contract, Express or Implied.

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modation party, he will not be allowed to prove his debt.<sup>51</sup> Where the liability of the principal upon an administration bond has been legally liquidated and ascertained, both as to the amount and the person to whom due, so as to fix the liability of the surety therein at the time of the filing of a petition in bankruptcy, by or against such surety, such liability is a provable debt.<sup>51a</sup>

**Subs. a (4). Founded on Open Account.**— These words have not yet been construed. In view of the words that follow, they seem almost unnecessary. If a debt is founded upon an open account its provability is not affected by the fact that the creditor has elected to sue as for a fraudulent conversion rather than for a balance due.<sup>51b</sup>

**Subs. a.(4). Founded on a Contract, Express or Implied.**— These are the most generic and valuable words in the subsection. The contract must, of course, be founded on a legal consideration, not against public policy, and, if by a corporation, not *ultra vires*.<sup>52</sup> Here the limitations due to the words of subdivision (1) already discussed do not apply. Nor need the claim be evidenced by a judgment or instrument in writing. But it is the debt resting on the contract, and not the contract liability that is provable. A claim for damages for breach of warranty upon a sale of personal property is for a debt founded upon a contract and is provable, although the amount thereof is undetermined.<sup>52a</sup> The importance of these doctrines when applied to indorser and surety liabilities has already been considered.<sup>53</sup>

*Continuing Contracts.*— It seems that a bond to pay an annuity may be proved at the penalty of the bond, provided the latter is less

51. In *re Dunnigan*, 2 N. B. N. Rep. 755. Compare, on this general subject, *Zartman v. Hines*, 6 Am. B. R. 139. re *Green*, Fed. Cas. 5,751. Compare also In *re Ervin*, 7 Am. B. R. 480, 114 Fed. 596.

51a. *Hibbard v. Bailey*, 12 Am. B. R. 104, 129 Fed. 575, reversing 10 Am. B. R. 545, 123 Fed. 185.

51b. *Crawford v. Burke*, 12 Am. B. R. 659, reversing 201 Ill. 581.

52. *Forsyth v. Woods*, 11 Wall. 484; *Buckner v. Street*, Fed. Cas. 2,098; In *re Chandler*, Fed. Cas. 2,590; In *re Young*, Fed. Cas. 18,145; In *re Jaycock*, Fed. Cas. 7,244; In

52a. In *re Grant Shoe Co.*, 12 Am. B. R. 349, 130 Fed. 881, affirming 11 Am. B. R. 48, 125 Fed. 576. See also In *re Stern*, 8 Am. B. R. 569, 116 Fed. 604, in which case it was held that claims for damages for breach of contract, are provable claims; In *re Stoeve*, 11 Am. B. R. 345, 127 Fed. 394.

53. See the last paragraph but one.

than the value of the annuity based on the mortuary tables.<sup>54</sup> Likewise, a salesman's claim on an annual contract which the bankruptcy of the employer makes impossible.<sup>55</sup> The reason is: There is a contract by which the liability is fixed, that, being broken by the bankrupt during course of performance, amounts to a rescission, a right of action thus vesting immediately in the creditor. But, it seems, the liability of a defendant in replevin on his bond given to secure the return of the chattels, is too contingent, even after judgment in replevin against him, and is thus neither provable nor dischargeable.<sup>56</sup> Where the trustee of a bankrupt tenant dispossesses a subtenant, a claim of the latter for breach of a covenant of quiet enjoyment contained in his lease, is not a provable debt against the tenant's estate, since it did not constitute "a fixed liability absolutely owing at the time of the filing of the petition."<sup>56a</sup> The effect of these doctrines on debts for accruing installments of rent and of alimony is explained later. Additional suggestive cases will be found in the foot-note.<sup>57</sup>

*Implied Contracts.*— This means the same as quasi-contracts. If the view expressed, *ante*, that, since the amendatory acts, all torts can be liquidated and then proved, ultimately prevails, the doctrine permitting the creditor to waive the tort and proceed on the theory of an implied contract, becomes of little importance.<sup>58</sup> In any event, a creditor whose claim is grounded in tort, is not entitled to priority, even one whose claim rests on conversion. Once the goods are sold and the avails mingled with the debtor's funds, such a creditor's claim is for damages only.<sup>59</sup>

**Subs. a (5). Founded on Judgments Entered after Bankruptcy.**— This clause gives statutory recognition to the doctrine of *Boynton v. Ball*,<sup>60</sup> which settled a controversy under the law of 1867, that outlasted the statute itself. The contention was that the debt, being merged in the judgment, and the latter post-dating the bankruptcy, became a new debt which could not be proved, and was, therefore,

54. Cobb v. Overman, *ante*.

55. In re Silverman, *ante*. See also In re Pollard, Fed. Cas. 11,252; also Orr v. Ward, 73 Ill. 318.

56. Clemmons v. Brinn, 7 Am. B. R. 714.

56a. In re Pennewell, 9 Am. B. R. 490 (C. C. A.), 119 Fed. 139.

57. Parker v. Bradford, 45 Iowa,

311; Fowler v. Kendall, 43 Me. 448; Robinson v. Pesant, 53 N. Y. 419; Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52.

58. Compare, generally, Keener on Quasi-Contracts.

59. Ungewitter v. Von Sachs, Fed. Cas. 14,343.

60. 121 U. S. 457.



Subs. a.]

Costs Incurred in Good Faith.

not discharged.<sup>61</sup> There can now be no doubt. The debt, whether merged or not — and it seems it is not — may be proved in the form of the judgment, provided costs and interest after the bankruptcy are credited. But the judgment must (1) be founded upon a provable debt, and (2) be entered before “the consideration of the bankrupt’s application for a discharge,” *i. e.*, before the day on which the show cause returnable thereon is called and heard.

**Subs. a (2). Costs Against an Involuntary Bankrupt.**— This and the succeeding subdivision, in a sense, extend the doctrine of *Boyn-ton v. Ball* to costs which were not taxable at the time of the bankruptcy. Costs taxed prior to that time are debts and may be proved as such.<sup>62</sup> Costs taxed subsequently are not, unless within the terms of subsection a (2) or subsection a (3).<sup>63</sup> There are no cases directly applicable to subsection a (2). Clearly such costs to be provable must, however, be against one who, when the petition was filed, was a plaintiff in an action which, on the adjudication, passed to the trustee, but which the trustee declines, after notice, to prosecute any further.

**Subs. a (3). Costs Incurred in Good Faith in an Action to Recover a Provable Debt.**— There was no similar provision in the law of 1867. Thus neither the party litigant nor the sheriff had a provable debt against the estate for the costs or disbursements on an attachment or judgment dissolved or set aside by the bankruptcy.<sup>64</sup> On the other hand where such annulled liens were shown to be similar to, and in aid of, the bankruptcy proceeding, the sheriff, or the creditor who had paid him, was often, for equitable reasons, awarded such costs and disbursements out of the estate.<sup>65</sup> It is not thought that subdivision (3) has modified these rules. The party litigant now has by statute a provable debt for his taxable costs and disbursements; so, perhaps, has the sheriff, if the party does not pay him. But that either has, where the costs and disbursements are

61. See *In re Pinkel*, 1 Am. B. R. 333; *In re McBryde*, 3 Am. B. R. 729, 99 Fed. 686.

62. *Ex parte Foster*, Fed. Cas. 4,960; *In re O’Neil*, Fed. Cas. 10,527.

63. See *In re Marcus*, 5 Am. B. R. 19, 104 Fed. 331; *Aiken v. Has-kins*, 6 Am. B. R. 46.

64. *Gardner v. Cook*, Fed. Cas.

5,226; *In re Ward*, Fed. Cas. 17,145; *In re Davis*, Fed. Cas. 3,616. See *Matter of Thompson Mercantile Co.*, 11 Am. B. R. 579.

65. *In re Williams*, Fed. Cas. 17,705; *In re Welch*, Fed. Cas. 17,367; *In re Jenks*, Fed. Cas. 7,276; *Zeiber v. Hill*, Fed. Cas. 18,206; *In re Holmes*, Fed. Cas. 6,631.

incident to a lien dissolved by § 67-f, may be doubted.<sup>66</sup> The cases as a rule discuss the right to priority rather than the right to prove.<sup>67</sup> There can be no priority under § 64-b (5) where there is no "debt."<sup>68</sup> However, the words of the subdivision make it clear that costs can be proven under it only (1) if taxable, (2) in a suit brought by a creditor (3) on a provable debt (4) before the filing of the petition, and (5) incurred in good faith. Lacking one or more of these elements, costs are not provable unless within the meaning of subdivision (2).

**Subs. b. Unliquidated Claims.**—The law of 1867 permitted the liquidation of damages for conversion only; that, as has been shown, was (aside from debts grounded in fraud or embezzlement) the only tortious liability provable. The words of the present law are much broader and seem to be taken from R. S., § 5068, which regulated the liquidation of "contingent debts and contingent liabilities." If, as previously suggested, all liabilities sounding in tort may be provable, they must be liquidated in the manner suggested in this subsection. This must be done within the year within which debts may be proved. If, however, the opposite and at present prevailing opinion ultimately prevails, then only debts coming within subsection a can be liquidated and no tortious liabilities may be, save on the theory of quasi-contract.<sup>68a</sup> A claim for unliquidated damages for personal injuries alleged to have been caused to a servant by the failure of a master to furnish safe appliances, arises *ex delicto* and is not of such a nature as to authorize a waiver of the tort and a recovery upon the quasi-contract, and is, therefore, not provable against the master's estate in bankruptcy.<sup>68b</sup> The liquidation is usually accomplished by a suit in the proper state court, but it can be in the bankruptcy court when all the facts are admitted.<sup>69</sup> Cases

66. In re Young, 2 Am. B. R. 673, 96 Fed. 606; In re Jennings, 8 Am. B. R. 358.

67. Compare In re Allen, 3 Am. B. R. 38, 96 Fed. 512; In re Lewis, 4 Am. B. R. 51, 99 Fed. 935. And generally under § 64-b (5).

68. See § 1 (11).

68a. In re Hirschman, 4 Am. B. R. 715, 104 Fed. 69, holding that subsection b covers only such claims as when liquidated are provable debts

under the classification of the preceding subsection a, and does not authorize the liquidation and proof of claims arising *ex delicto* unless they are of such a nature that the claimant might at his election waive the tort and recover in quasi contract. See also In re Filer, 5 Am. B. R. 582.

68b. Matter of Wigmore & Sons Co., 10 Am. B. R. 661.

69. In re Rouse, 1 Am. B. R. 393.

## Subs. b.]

## Contingent Liabilities.

under the former law will be found in the foot-note.<sup>70</sup> Those under the present law are not yet numerous, and few are in point on this phase of the question.<sup>71</sup>

*Contingent Liabilities.*—There is a broad distinction between “unliquidated damages” and “contingent liabilities.”<sup>72</sup> The phrase here “unliquidated claims” may refer to both. The former law provided for the liquidation of contingent debts and liabilities,<sup>73</sup> and the cases under it, as well as those under its predecessor, drew a clear distinction between demands whose existence depended on a contingency and existing demands where the cause of action depended on a contingency; the former not being provable in any event and the latter only when liquidated.<sup>74</sup> The present law has no similar clause and it has been vigorously asserted that contingent claims cannot now be liquidated or proven.<sup>75</sup> We have already seen, however, that an indorser or a surety may have a provable claim, even if the contingency fixing it does not happen until after the bankruptcy. The same reasoning will doubtless extend to all existing demands based on contract where only the cause of action depends on a contingency. Such a construction harmonizes the statute both as to distribution of assets and as to the dischargeability of debts, and explains an omission for which there was no reason, in fact, which, if intentional, was wrong. Such a contingency may, it is thought, be liquidated under the terms of subsection b; with, however, this limitation, that both (1) the contingency must happen and (2) the liquidation be accomplished during the time within which a claim may be proven.<sup>76</sup> The conditional preliminary proof au-

70. In re Smith, Fed. Cas. 12,975; In re Cook, Fed. Cas. 3,151; Ex parte Lake, Fed. Cas. 7,991; Abbott v. Rowan, 33 Ark. 593.

71. For instance, those cited under Sections Seventeen and Fifty-nine.

72. Consult Zimmer v. Schleeauf, 115 Mass. 52.

73. R. S., § 5068. “In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens be-

fore the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.”

74. Raggin v. Magwire, 15 Wall. 549; French v. Morse, 68 Mass. 111; Jemison v. Blowers, 5 Barb. (N. Y.) 686; McNeil v. Knott, 11 Ga. 142; In re Mead, 14 Fed. 287.

75. For example, read Collier on Bankruptcy, 3d ed., pp. 382, 383.

76. § 57-n.

thorized by the former law should, however, not be permitted.<sup>77</sup> A claim cannot be proved for a breach of a covenant in a lease to the effect that the lessee would after re-entry indemnify the lessor against all loss of rents and other payments which might occur by reason of the termination of the lease, since in such a case the damages, if any, could not be ascertained until the term of the lease had expired as originally limited, or there had been a reletting.<sup>77a</sup>

### III. WHAT DEBTS ARE NOT PROVABLE.

**In General.**—From what has already been said, it results that substantially all liabilities either *ex contractu* or *ex delicto*, provided they are liquidated either before the bankruptcy, or, if not, thereafter, are provable debts under the terms of subsection b. There are exceptions, which, and the reasons for them, are considered here.

*Judgments for Fines.*—These are not provable,<sup>78</sup> though there is respectable authority the other way.<sup>79</sup> Fines are provable, if at all, only because “a fixed liability absolutely owing.” But the criminal does not “owe” a fine; it is not a debt, but a punishment. Further, if provable, they are, under § 17, dischargeable. The courts will hardly impute to Congress an intention thus to grant amnesty to criminals whose punishment consists of a fine.<sup>80</sup> The opposite rule doubtless applies when the judgment is for a penalty or forfeiture.

*Alimony Due or to Accrue.*—Were *Audubon v. Schufeldt*<sup>81</sup> national in its scope, alimony, whether in arrears or to accrue, would not be a provable debt. As it is, there may still be some doubt in those states where it, when decreed by a court, is a debt merely.<sup>82</sup> That it is a duty measured up in dollars is the almost universal view, a reason alone sufficient to take it out of the meaning of § 63. Further, alimony to accrue is never a fixed liability, being always subject to change by the court that decrees it. Still further, it is not a judgment in the ordinary sense, the method of collection

<sup>77</sup>. Compare foot-note 73, ante.

<sup>77a</sup>. In re Shaffer, 10 Am. B. R. 633, 124 Fed. JII, In re Ells, 3 Am. B. R. 564, 98 Fed. 967. See also Evans v. Lincoln Co., 10 Am. B. R. 401, 204 Pa. St. 448, 54 Atl. 321.

<sup>78</sup>. In re Moore, 6 Am. B. R. 590, 111 Fed. 145.

<sup>79</sup>. In re Alderson, 3 Am. B. R. 544 (see cases cited in foot-note).

<sup>80</sup>. See 1 N. B. N. 48, 57.

<sup>81</sup>. 181 U. S. 575, 5 Am. B. R. 829.

<sup>82</sup>. For instance, in Kentucky, see In re Houston, 2 Am. B. R. 107, 94 Fed. 119.

<sup>83</sup>. See § 17-a (2).

being far different. It is true that in this view, the amendment of 1903, exempting alimony from the effect of a discharge,<sup>83</sup> is superfluous. Now, however, alimony, whether due at the time of bankruptcy or accrued or to accrue thereafter, is not a provable debt. The cases are summarized elsewhere.<sup>84</sup>

*Rent to Accrue.*—The law of 1867 contained a clause which limited the proof of "rent or any other debt falling due at fixed and stated periods" to the moment of bankruptcy.<sup>85</sup> Under it, it was often held that rent to accrue was not provable.<sup>86</sup> Though there is no such clause in the present law, the great weight of authority is that rent to accrue is not even a contingent claim,<sup>87</sup> and is, therefore, not capable of proof.<sup>88</sup> The reasons given are various, but that asserting that the adjudication amounts to a breach of the lease has already been challenged and may be doubted.<sup>89</sup> Rent to accrue is not a fixed liability absolutely owing, because there may be a change in the relation of the parties by consent or breach at any time. It does rest upon a contract,<sup>90</sup> and, therefore, could be liquidated, were it not for the fact that "its very existence depends on a contingency,"<sup>91</sup> no claim of which character can or ever has been capable of liquidation and proof.<sup>92</sup> It has been held that notes given by a bankrupt for rent accruing subsequent to adjudication are without consideration, since the rent or debt for which they were given cannot possibly come into existence, and such notes cannot, therefore, be proved against the estate of the bankrupt lessee.<sup>92a</sup> Where

84. See Section Seventeen, p. 211.

85. § 19, R. S., § 5071.

86. *In re May*, Fed. Cas. 9,325; *In re Hufnagel*, Fed. Cas. 6,837; *In re Croney*, Fed. Cas. 3,411.

87. Compare *Ex parte Houghton*, Fed. Cas. 6,725.

88. *In re Jefferson*, 2 Am. B. R. 206, 93 Fed. 948; *In re Arnstein*, 4 Am. B. R. 246, 101 Fed. 706; *In re Collignon*, 4 Am. B. R. 250; *In re Mahler*, 5 Am. B. R. 453, 105 Fed. 428; *Atkins v. Wilcox*, 5 Am. B. R. 313, 105 Fed. 595; *In re Ells*, 3 Am. B. R. 564, 98 Fed. 967; *In re Hays, etc., Co.*, 9 Am. B. R. 144, 117 Fed. 879. Apparently *contra*, *In re Goldstein*, 2 Am. B. R. 603.

89. Compare *In re Jefferson*, *supra*, with *In re Ells*, *supra*. That

the adjudication of bankruptcy does not ipso facto terminate a lease, see *In re Pennewell*, 9 Am. B. R. 490 (C. C. A.), 119 Fed. 139.

90. § 63-a (4).

91. *Deane v. Caldwell*, 127 Mass. 242.

92. Compare *In re Mahler*, *supra*.

92a. *In re Curtis*, 9 Am. B. R. 286 (La. Sup.), 33 So. 125. It was held upon rehearing in this case that the indorser on notes given for such rent was liable thereon upon the theory that although such notes were not provable against the bankrupt estate, the consideration was not affected by the bankruptcy of the lessee, the non-provability of the notes being based upon the contingent nature of the claim.

a receiver in bankruptcy continues in occupation of leased premises, from the filing of the petition until the tenant's adjudication as a bankrupt, it has been held that the landlord may prove for rent down to the time of the adjudication, as for a debt founded upon an express contract.<sup>92b</sup> An attempt was made, when the amendatory act of 1903 was under consideration, to insert a clause which, while denying provability to rent to accrue, declared the bankrupt's discharge a release therefrom; but it was voted down in the House Committee on the Judiciary. Of course, if the trustee elects to assume the lease and sell the same and the landlord acquiesces, the trustee steps into the bankrupt's shoes, and the question here discussed will not arise. The trustee, however, usually retains possession for a brief period, paying on a *quantum meruit* basis meanwhile.

*Debts Outlawed by a Statute of Limitations.*—Such debts are not provable. The limitation period depends upon the law of the State in which the action could be brought. There was some conflict on this question under the law of 1867, high authority holding that the provability of such a debt turned on whether the statute of limitations urged against it went merely to the remedy or actually destroyed the obligation.<sup>93</sup> But the weight of authority under that law was the other way.<sup>94</sup> The cases under the law of 1898 are to the same effect.<sup>95</sup> The reason for this doctrine seems to be one of abstract equity. Strictly, an outlawed debt is within the terms of § 63-a (1) and, therefore, provable. But, since such a debt could not have been asserted before bankruptcy against the objection of the debtor, the law prevents its proof against the other creditors and the consequent reduction of their *pro rata* by an interloper whose remedy has been lost by his own *laches*. It seems, too, that bankruptcy stops the running of the time and that a debt may be proven within the statutory year, provided the period of limitation expired after the bankruptcy.<sup>96</sup> The statute of limitations of the state of the bank-

<sup>92b</sup>. Matter of Hinckel Brewing Co., 10 Am. B. R. 484, 123 Fed. 942; but see contra In re Adams, 12 Am. B. R. 368, 130 Fed. 381.

<sup>93</sup>. In re Ray, Fed. Cas. 11,589; In re Shepard, Fed. Cas. 12,753.

<sup>94</sup>. In re Kingsley, Fed. Cas. 7,819; In re Hardin, Fed. Cas. 6,048; In re Cornwall, Fed. Cas. 3,250; In

re Reed, Fed. Cas. 11,635; In re Noeson, Fed. Cas. 10,288.

<sup>95</sup>. In re Lipman, 2 Am. B. R. 46, 94 Fed. 353; In re Resler, 2 Am. B. R. 602, 95 Fed. 804. The same cases hold that scheduling an outlawed debt does not revive it.

<sup>96</sup>. In re Eldridge, Fed. Cas. 4,331. Contra, Nicholas v. Murray, Fed. Cas. 10,223.

rupt's residence, and in which he was adjudged a bankrupt, governs the rights of creditors in the administration of the bankrupt's estate.<sup>96a</sup> Any creditor of the bankrupt may interpose the statute of limitations as a defense against the allowance of a claim.<sup>96b</sup> It is the duty of a trustee to plead the statute wherever an outlawed claim is presented.<sup>96c</sup>

**Cross-References.**— The liability of an estate in bankruptcy to pay a general assignee or receiver for his services and disbursements, or his attorney, or a sheriff proceeding on an execution or attachment, as well as the priorities sometimes claimed by them, is considered under Section Sixty-four.

**96a.** Hargadine, etc., Dry Goods 290, 122 Fed. 558; In re Kingsley, Co. v. Hudson, 10 Am. B. R. 225, 122 Fed. Cas. 7,819.  
**96b.** In re Lafferty, 10 Am. B. R. 247, 118 Fed. 670.  
**96c.** In re Wooten, 9 Am. B. R. Fed. 232, affirming 6 Am. B. R. 657.

## SECTION SIXTY-FOUR.

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### DEBTS WHICH HAVE PRIORITY.

§ 64. **Debts which have Priority.**—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court.

*b* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, *and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery,\** (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

*c* In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property

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\*Amendment of 1903 in italics.



§ 64.]

Synopsis of Section.

sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

**Analogous provisions:** In U. S.: Act of 1867, § 28, R. S., § 5101; Act of 1841, § 5; Act of 1800, § 62.

In Eng.: Preferential Payments in Bankruptcy Act of 1888, § 1.

**Cross references:** To the law: §§ 12; 13; 14; 15; 17; 57; 62; 63; 65; 67-c-f.

To the General Orders: X, XXVIII.

To the Forms: None.

## SYNOPSIS OF SECTION.

### I. Debts Which Have Priority.

Comparative Legislation.

Debts Due the United States.

Conflicting or Overlapping State Priorities.

Order of Priority.

Priorities versus Liens.

Practice.

### II. Statutory Priorities.

#### Subs. a. Taxes.

*Taxes Entitled to Priority.*

*Right to Subrogation upon Payment of Taxes.*

*Taxes Accrued Since Proceedings were Instituted.*

*Illustrative Cases.*

#### Subs. b (1). Cost of Preserving the Estate.

*Amendment of 1903.*

#### Subs. b (2). Filing Fees in Involuntary Cases.

#### Subs. b (3). Cost of Administration.

*Witness Fees and Mileage.*

*Attorneys' Fees.*

#### Subs. b (4). Wages.

*Meaning of "Workmen, Clerks or Servants."*

#### Subs. b (5). Debts Entitled to Priority under State Laws.

*Illustrative Cases.*

*Liens.*

*Fees and Expenses of General Assignees and Receivers, and their Attorneys.*

*Sheriff's Fees.*

*Sheriff's Disbursements.*

### III. Subs. c. Disposition of Property on Revocation of Discharge or Composition.

Cross-Reference.

## I. DEBTS WHICH HAVE PRIORITY.

**Comparative Legislation.**—The list of debts entitled to priority has increased with each successive bankruptcy law. That of England, in substance, gives priority of payment to (1) the costs of administration, (2) taxes, (3) wages to a limited amount within a limited time, and (4) rent where the landlord has distrained the bankrupt's goods.<sup>1</sup> Our law of 1800 merely saved debts due the United States; that of 1841 added debts for labor within six months to the amount of \$25.<sup>2</sup> The law of 1867 provided five classes of priority debts: (1) costs of suits in the proceeding and for preserving the estate; (2) debts and taxes due the United States; (3) debts and taxes due the States; (4) wages to an operative, clerk or house-servant not to exceed fifty dollars for labor performed within six months; (5) priorities given by the laws of the United States.<sup>3</sup> The present act goes much further.

**Debts Due the United States.**—These are entitled to priority of payment. This follows from § 3466 of the Revised Statutes,<sup>4</sup> though the words are somewhat general. It even seems that the United States need not prove its debt,<sup>5</sup> and that the doctrine of *laches* does not apply, any more than to any other sovereign.<sup>6</sup> Hence, § 3467, which makes the trustee personally liable, if, with notice, he fails to pay a debt due the United States.<sup>7</sup> Being a debt, the order of payment is probably next after taxes, which are not debts, cannot be proved as such and are not affected by a discharge.<sup>8</sup> This doctrine is ancient<sup>9</sup> and, even in the absence of statutory provisions, would probably be enforced, the sovereign not being affected by the provisions of a statute, unless an intention so to do therein appears.

**Conflicting or Overlapping State Priorities.**—An interesting question which thus far has received little attention is, the effect of § 64-b (5) where the state statute gives priority to a class or for

1. See § 1, Preferential Payments in Bankruptcy Act of 1888.

2. See "Analogous Provisions," ante.

3. § 28, R. S., § 5101.

4. U. S. v. Fisher, 2 Cranch, 358; Lewis v. U. S., 92 U. S. 618; In re Rosey, Fed. Cas. 12,066; U. S. v. Griswold, 8 Fed. 496.

5. U. S. v. Murphy, 15 Fed. 589; In re Huddell, 47 Fed. 206.

6. Cooke v. U. S., 91 U. S. 389; Hart v. U. S., 95 U. S. 316.

7. U. S. v. Barnes, 31 Fed. 705.

8. Compare In re Cleanfast Hosiery Co., 4 Am. B. R. 702.

9. Field v. U. S., 9 Pet. 182.

a purpose specified in the other subdivisions of § 64-b. On principle, it would seem that where the federal statute prescribes a class as entitled to priority, as "workmen, clerks or servants," no overlapping state statute having the same purpose but defining the class in different words should apply.<sup>10</sup> Thus, it has been well said by Judge Lowell:

"When both a state law and the bankrupt act give priority to the same class of debts, the bankrupt act not only controls the state law in case of absolute conflict between the two, but, by its express regulation of these priorities, excludes the state law altogether."<sup>11</sup>

This distinction seems sometimes to have been overlooked.<sup>12</sup>

**Order of Priority.**—The words "order of payment" clearly indicate that, after taxes and debts to the United States, priority debts must be paid in the order indicated in subdivision b. If there is not sufficient to pay all priority debts, the last class in order abates first. If priority debts of a given class, as those specified in subdivision (3), must abate in part, the order between each of them is fixed by general equity rules.<sup>13</sup>

**Priorities versus Liens.**—Many cases seem to hold the broad doctrine that these priorities are superior to valid liens.<sup>14</sup> This may be doubted;<sup>15</sup> even where property vested in the trustee is sold free and clear of incumbrances. It is true that the whole estate is or may be marshaled and administered and liens paid through the trustee. But the rule that the bankrupt's assets comes to his trustee charged with all *bona fide* liens,<sup>16</sup> even if within the four months' period, seems to negative the doctrine of the cases cited at the beginning of this paragraph. The question is often one of extreme difficulty. Equity may step in and charge against property affected by liens the "cost of preserving" it, or a proportionate share of the "attorney's fee"—this, however, only on a

10. Thus, see *In re Rouse*, 1 Am. B. R. 231, 91 Fed. 514; *In re Union Planing Mill*, 2 N. B. N. Rep. 384; *In re Shaw*, 6 Am. B. R. 501, 109 Fed. 782.

11. *In re Lewis*, 4 Am. B. R. 51, 99 Fed. 935.

12. See *In re Byrne*, 3 Am. B. R. 268, 97 Fed. 762; *In re Lawler*, 6 Am. B. R. 184, 110 Fed. 135.

13. *In re Burke*, 6 Am. B. R. 502.

14. For instance: See *In re Coffin*, 2 Am. B. R. 344; *In re Byrne*, supra; *In re Tebo*, 4 Am. B. R. 235, 101 Fed. 419.

15. Compare *In re Frick*, 1 Am. B. R. 719; *In re McConnell*, Fed. Cas. 8,712; *In re Hambright*, Fed. Cas. 5,973; *Gardner v. Cook*, Fed. Cas. 5,226.

16. *Yeatman v. Savings Inst.*, 95 U. S. 764.

showing that his service was beneficial to the property or lienor — but equity presumably will not declare the “filing fees” or “wages” or “state priorities” superior to valid liens. The lien creditor is prior in right, and should, therefore, unless directly benefited by the acts or disbursements for which priority is claimed, be prior in distribution.<sup>17</sup>

**Practice.**— Priority should be specifically claimed. This is usually done by a sentence to that effect and giving the grounds of the claim, inserted in the proof of debt. If not claimed, it will be deemed waived; though amendment setting up the claim will usually be allowed. It is not lost even if a claim is not made until after the first dividend.<sup>18</sup> A priority debt duly proved and allowed, should not be ordered paid until it appears that there will be enough assets to pay in full all like debts of the same and higher classes.

## II. STATUTORY PRIORITIES.

**Subs. a. Taxes.**— The present law is somewhat broader than its predecessor, which required payment in full only of taxes due the United States or the State. The subsection is explicit and needs little explanation. The words “taxes legally due and owing by the bankrupt” and “in advance of the payment of dividends to creditors” should be noted. In spite of them, the tendency has been to construe subsection a as putting taxes in a different and really higher class than the debts enumerated in subsection b; this is probably the law. Construed strictly, the words of this subsection also lead to the result, that taxes must be paid in any event. The right of priority exists even if the property on which taxes were assessed never came into the possession of the trustee.<sup>18a</sup> But, it is thought — the manifest intention of Congress being merely to insure payment — if the tax is by law made a lien or charge on the bankrupt’s property, the same equitable principle which denies to the individual whose debt is fully secured the right to share in the general fund applies to the tax claimant,<sup>19</sup> and if the property subject to the tax is sold the tax should be paid out of the proceeds

<sup>17</sup>. Compare, generally, Sections Sixty-seven and Seventy.

<sup>18</sup>. In re Scott, 2 Am. B. R. 324, 93 Fed. 418.

<sup>18a</sup>. Waco, City of, v. Bryan, 11

Am. B. R. 481 (C. C. A.), 127 Fed. 79.

<sup>19</sup>. But see In re Stalker, 10 Am. B. R. 709, 123 Fed. 961.

Subs. a.]

Right to Subrogation upon Payment of Taxes.

before any part thereof is distributed to general creditors.<sup>19a</sup> This is especially true when the payment would inure solely to the benefit of a secured creditor.<sup>20</sup> Any other decision violates equity; indeed, often sanctions confiscation. The weight of authority seems, however, to sustain the harsher view.<sup>21</sup> Where real property which is subject to a tax lien is sold divested of that lien, under an order of the court, the purchaser acquires a clear title and the claim for taxes has priority over the claims of general creditors against the other assets in the hands of the trustee.<sup>22</sup> The act does not contemplate that taxes assessed upon the bankrupt's real property, and which are matters of public record, shall be proved like an ordinary debt.<sup>22a</sup>

*Taxes Entitled to Priority.*—An annual license fee required to be paid by a corporation as a condition of its continued existence and not based upon the value of its property or franchises has been held not to be a tax within the meaning of this section.<sup>22b</sup> But this question must in each case be determined by the statutes and decisions of the courts in which the fee is payable.<sup>22c</sup> An assessment levied for a local improvement is a tax entitled to priority of payment.<sup>22d</sup> A failure of a lessee to comply with a covenant in his lease to pay water rents or charges has been held not to give the lessor or the municipality a claim to priority of payment out of the funds of the estate of the bankrupt lessee.<sup>22e</sup>

*Right to Subrogation upon Payment of Taxes.*—Where a purchaser of land upon which taxes were unpaid paid a judgment for such taxes, he is not subrogated to the rights of the municipality and cannot claim priority of payment upon the grantor of the lands being adjudged a bankrupt. Such judgment becomes in the hands of the person paying it an unsecured claim and is entitled to no

19a. In re Harvey, 10 Am. B. R. 567, 122 Fed. 745.

20. In re Veitch, 4 Am. B. R. 112, 101 Fed. 251.

21. In re Tilden, 1 Am. B. R. 300, 91 Fed. 500. For later cases, see In re Baker, 1 Am. B. R. 526; In re Hollenfeltz, 2 Am. B. R. 499, 94 Fed. 629; In re Conhaim, 4 Am. B. R. 58; In re Hilberg, 6 Am. B. R. 714.

22. In re Prince, 12 Am. B. R. 675.

22a. In re Prince, 12 Am. B. R. 675; In re Harvey, 10 Am. B. R. 567, 122 Fed. 745.

22b. In re Danville Rolling Mill Co., 10 Am. B. R. 327, 121 Fed. 432. Contra, Matter of Mutual Mercantile Agency, 8 Am. B. R. 435.

22c. First Nat. Bank v. Aultman, 12 Am. B. R. 13, citing In re Ott, 2 Am. B. R. 637, 647; In re Camp, 1 Am. B. R. 165.

22d. In re Stalker, 10 Am. B. R. 709, 123 Fed. 961.

22e. In re Broom, 10 Am. B. R. 427, 123 Fed. 639. See In re Parker, Fed. Cas. No. 10,719.

priority.<sup>22f</sup> A purchaser at a tax sale is not entitled to subrogation to a municipality's right of priority of payment of taxes from the assets of the bankrupt.<sup>22g</sup>

*Taxes Accrued Since Proceedings were Instituted.*—Taxes upon property in the hands of the trustee, accrued since the proceedings were instituted, do not fall within the strict letter of the law, but the bankruptcy act does not withdraw the estates of bankrupts from the reach of the taxing power and they are subject, in consequence, to the payment of taxes imposed while in the hands of trustees.<sup>22h</sup>

*Illustrative Cases.*—Other cases in point on the payment of taxes under the present and the former law will be found in the footnote.<sup>23</sup>

**Subs. b (1). Cost of Preserving the Estate.**—The words of this subdivision are broad and have a corresponding elasticity of application. They give priority to the (1) actual and (2) necessary cost (3) of preserving the estate (4) subsequent to filing the petition. This has been thought to include the costs and disbursements of receivers in bankruptcy and other officers pending the adjudication and appointment of trustees.<sup>24</sup> But these are sufficiently within § 62. Hence, the reference here seems rather to the expenses of parties, not officers, in preserving the estate.<sup>25</sup> The impossibility of phrasing any rule whereby to determine when priority will be decreed is apparent. Nor, it seems, is it material what has been paid, as long as the court finds that the disbursement was not necessary.<sup>26</sup>

*Amendment of 1903.*—The doctrine that the expense of preserv-

<sup>22f</sup> *Cooper Grocery Co. v. Bryan*, 11 Am. B. R. 734 (C. C. A.), 127 Fed. 815, citing *City of Waco v. Bryan*, 11 Am. B. R. 481 (C. C. A.), 127 Fed. 9. See *In re Barr Pumping Engine Co.*, 11 Am. B. R. 312.

<sup>22g</sup> *In re Brinker*, 12 Am. B. R. 122, 128 Fed. 634.

<sup>22h</sup> *In re Prince*, 12 Am. B. R. 675; *Swarts v. Hammer*, 9 Am. B. R. 691, 120 Fed. 256; affirmed 194 U. S. 441, 11 Am. B. R. 708; *City of Waco v. Bryan*, 11 Am. B. R. 481 (C. C. A.), 127 Fed. 79; *In re Sims*, 9 Am. B. R. 162, 118 Fed. 356; *In re Keller*, 6 Am. B. R. 356, 109 Fed. 131; *In re Conhaim*, 4 Am. B. R. 59, 100 Fed. 268.

<sup>23</sup> *In re Ott*, 2 Am. B. R. 637,

95 Fed. 274; *In re Force*, 4 Am. B. R. 114; *In re Forbes*, 7 Am. B. R. 42; *In re Cleanfast Hosiery Co.*, ante; *In re Keller*, 6 Am. B. R. 351, 109 Fed. 131; *In re Green*, 8 Am. B. R. 553, 116 Fed. 118; *U. S. v. Herron*, 20 Wall. 251; *In re Moller*, Fed. Cas. 9,700; *In re Brand*, Fed. Cas. 1,809; *In re Ambler*, Fed. Cas. 271.

<sup>24</sup> *In re Scott*, 3 Am. B. R. 625, 99 Fed. 404.

<sup>25</sup> *In re Burke*, 6 Am. B. R. 502. Compare, also, generally, cases cited sub nom. "Cost of Administration," "Fees of General Assignees," and "Sheriff's Fees," post, under this Section.

<sup>26</sup> *In re Allen*, 3 Am. B. R. 38, 96 Fed. 512.

Subs. b (2).]

Filing Fees in Involuntary Cases.

ing the estate is entitled to priority was, prior to the amendatory act, carried to the extent of decreeing costs out of the estate to creditors who before the bankruptcy had obtained a lien, by means of which all the creditors were equally benefited.<sup>27</sup> There was doubt, however, whether this was the law. The amendatory act of 1903 has removed the doubt by the words added to subdivision (2). Now, to entitle a creditor to an allowance for expenses and priority of payment, the applicant must show that he has (1) at his expense (2) recovered for the benefit of the bankruptcy estate (3) property which the (4) bankrupt had transferred or concealed.<sup>28</sup> If the creditor shows this, he is entitled to his "reasonable expenses" in so doing. It is immaterial whether the transfer or concealment was before or after the petition. Nor is it thought that the word "recovered" will be construed strictly; it should be enough if any active agency, which was either the moving cause or without which recovery would have been unlikely or impossible, is shown. The amendment is available only in bankruptcy proceedings begun after February 5, 1903.<sup>29</sup>

**Subs. b (2). Filing Fees in Involuntary Cases.**—This subdivision should be read in connection with § 3-e and General Order XXXIV. The three together fix the rights of the respective parties to costs and disbursements on creditors' petitions for involuntary bankruptcy. Such a creditor is entitled, not only to a return of his filing fee, but also his other disbursements, as for service of process;<sup>30</sup> the latter, however, as cost of administration, rather than under this subdivision. A priority of this kind may be claimed by a verified account filed with the trustee; but the same should not be paid until allowed by the referee. This priority is akin to, but not the same as, that for indemnity deposits required by General Order X.<sup>31</sup> On the analogy of these provisions, money advanced by the attorney or friend of a voluntary bankrupt to pay the filing

27. In re Lesser, 5 Am. B. R. 320; reversed on another point in *Metcalf v. Barker*, 9 Am. B. R. 36. Compare, also, In re Little River Lumber Co., 3 Am. B. R. 682, 101 Fed. 558; In re Groves, 2 N. B. N. Rep. 466.

28. For definitions of these words, see § 1.

29. See "Supplementary Section to Amendatory Act," post.

30. In re Silverman, 3 Am. B. R. 227, 97 Fed. 325.

31. Compare In re Matthews, 3 Am. B. R. 265, 97 Fed. 772; also In re Burke, ante.

fee is often ordered paid in full out of the estate when collected in;<sup>32</sup> but such an advancement is strictly a "cost of administration."

**Subs. b (3). Cost of Administration.**—This phrase includes the priorities mentioned in the preceding subdivisions. A similar idea is expressed in "the actual and necessary expenses incurred by officers in the administration of estates" in § 62. It may include the referees' fees for allowing claims, fixed by § 40, as amended by the act of 1903. It may also include a great variety of disbursements made necessary in the administration of the estate but not costs awarded in proceedings not a part of the bankruptcy proceeding.<sup>33</sup> It is impossible to phrase any fixed rule.

*Witness Fees and Mileage.*—These are expressly given priority. They would have it were the law silent. Their amount is fixed by the Revised Statutes.<sup>34</sup>

*Attorneys' Fees.*—This subject is considered in detail under Section Sixty-two. The allowance must be (1) in one item,<sup>35</sup> (2) reasonable, and (3) for professional services actually rendered. Thus where partnership bankrupts have different attorneys but one allowance can be made.<sup>36</sup> Clerical work performed by an attorney in posting the bankrupt's books and in making extra copies of schedules cannot be charged for as professional services.<sup>36a</sup> It should affirmatively appear that the services were reasonably necessary and rendered in good faith,<sup>36b</sup> although the prevailing opinion seems to be that the attorney for petitioning creditors in an involuntary proceeding is entitled as a matter of right to a reasonable fee, the amount to be determined upon evidence of the services performed and their value.<sup>36c</sup> Though but three kinds of legal services in bankruptcy cases are enumerated in this subsection, services not coming within the words must still be paid for and are entitled to priority, if

32. See *Whiston v. Smith*, Fed. Cas. 17,523.

33. For exceptions to this rule, see *In re Lesser*, supra; *In re Neely*, 5 Am. B. R. 836, 108 Fed. 371.

34. § 848. See also under Section Twenty-one, ante.

35. *In re Lewin*, 4 Am. B. R. 632, 103 Fed. 850.

36. See *In re Eschwege*, 8 Am. B. R. 282.

36a. *In re Connell & Sons*, 9 Am. B. R. 474, 120 Fed. 846.

36b. *In re Rosenthal*, 9 Am. B. R. 626, 120 Fed. 848; *In re Carr*, 9 Am. B. R. 58.

36c. *Smith v. Cooper*, 9 Am. B. R. 755 (C. C. A.), 120 Fed. 230; *In re Curtis*, 4 Am. B. R. 17 (C. C. A.), 100 Fed. 784; *In re Goldville Mfg. Co.*, 10 Am. B. R. 552, 118 Fed. 892; *In re Lang*, 11 Am. B. R. 794, 127 Fed. 755.



Subs. b (4).1

Wages.

within the meaning of "cost of administration." But an attorney's priority is not superior to that of a *bona fide* lienor.<sup>37</sup>

**Subs. b (4). Wages.**—Here the rule as to a conflict between the bankruptcy law and a state statute concerning wage priorities should be noted.<sup>38</sup> An analogous but different priority to the wage-earner is probably given by every state law. Still, such statutes apply in certain circumstances, as where they give priority for labor over even an existing mortgage,<sup>39</sup> or where, in case of insolvency, a lien is given.<sup>40</sup> But such claims are not usually prior to valid vested liens.<sup>41</sup> It has been thought that if assigned to one not a workman, clerk, or servant, the right to priority is lost.<sup>42</sup> But this doctrine applies, if at all, only to wage claims assigned before the bankruptcy.<sup>43</sup> If the claim be assigned after being proved, the assignee is subrogated to the priority of the assignor.<sup>43a</sup> The labor must have been performed within three months of the filing of the petition,<sup>44</sup> although a different and longer period be prescribed by a state statute.<sup>44a</sup> The holding that, if performed thereafter without actual notice of the bankruptcy, the right to priority exists, seems erroneous;<sup>45</sup> though perhaps such a disbursement could be allowed as an expense of administration. If a labor claim is reduced to judgment within the four months' period, priority may still be asserted to the amount of the judgment,<sup>46</sup> but probably not for the costs. The claim must be for wages actually earned within the prescribed time, and a judgment for a breach of a contract of employment based upon an unlawful discharge of the employee is not entitled to priority.<sup>46a</sup>

37. In re Frick, ante. Contra, In re Duncan, 2 Am. B. R. 321. Compare also In re Tebo, ante.

38. See "Conflicting and Overlapping State Priorities," in this Section, ante.

39. In re Matthews, 6 Am. B. R. 96, 109 Fed. 603. But see In re Mulhauser Co., 10 Am. B. R. 231, 121 Fed. 669.

40. In re Coe, Powers & Co., 6 Am. B. R. 1.

41. See "Priorities versus Liens," ante; In re Tebo, ante, is thus not a reliable authority.

42. In re Westlund, 3 Am. B. R.

646, 99 Fed. 399. Contra, Matter of Harmon, 11 Am. B. R. 64.

43. In re Campbell, 4 Am. B. R. 535, 102 Fed. 686; In re Brown, Fed. Cas. 1,974.

43a. In re North Carolina Car Co., 11 Am. B. R. 488, 127 Fed. 178.

44. In re Rouse, 1 Am. B. R. 234, 91 Fed. 96, reversing s. c., 1 Am. B. R. 231, 91 Fed. 514.

44a. Matter of Slomka, 9 Am. B. R. 635 (C. C. A.), 122 Fed. 630, reversing 9 Am. B. R. 124.

45. In re Gerson, 1 Am. B. R. 251.

46. In re Anson, 4 Am. B. R. 231, 101 Fed. 698.

46a. Matter of Lewis Co., 12 Am. B. R. 279; but as to salary payable

*Meaning of "Workmen, Clerks, or Servants."*—This is not, it seems, controlled by the statutory definition of "wage-earner."<sup>47</sup> Nor would an attempt at definition be profitable. The words are used in their common and popular sense; dictionaries should be consulted, as well as cases. The phrase "operative, clerk, or house-servant," in the law of 1867, is thought to be practically equivalent. Cases construing these words will be found in the foot-note.<sup>48</sup> Under the present law, the following have been held not entitled to priority under this subsection: a contractor,<sup>49</sup> a general buyer for jobbers,<sup>49a</sup> a traveling salesman earning \$5,000 a year,<sup>50</sup> a traveling salesman, irrespective of salary,<sup>51</sup> an officer or manager of a corporation,<sup>52</sup> and a person engaged merely in an incidental agency.<sup>53</sup> But a clerk selling goods in a store is entitled to priority,<sup>54</sup> and so is a laborer "working by the piece."<sup>54a</sup>

**Subs. b (5). Debts Entitled to Priority under State Laws.**—Here the practitioner should again bear in mind the rule as to liens, previously stated.<sup>55</sup> If the state law gives a lien and it continues after bankruptcy, the priority exists in effect though not in name; the property becomes charged with the lien, and § 64, strictly speaking, does not apply. In this connection, too, § 67 on liens avoided by the adjudication should be consulted. It must be remembered, too, that this subdivision has no application where the state statute gives priority to a class already given priority by the bankruptcy law; the bankrupt act not only controls the state law in case of absolute conflict, but by its express regulation of these priorities excludes the state law altogether.<sup>55a</sup> Subject to these exceptions, if

to clerks on vacation during three months period, see *In re Gladding*, 9 Am. B. R. 700, 120 Fed. 709.

<sup>47.</sup> *In re Scanlon*, 3 Am. B. R. 202, 97 Fed. 26; *In re Gurewitz*, 10 Am. B. R. 350 (C. C. A.), 121 Fed. 982.

<sup>48.</sup> *Ex parte Rockett*, Fed. Cas. 11,977; *In re Pevear*, Fed. Cas. 11,053; *In re Erie Rolling Mill Co.*, 1 Fed. 585; *In re Waties*, 39 Fed. 264.

<sup>49.</sup> *In re Rose*, 1 Am. B. R. 68.

<sup>49a.</sup> *Matter of Smith*, 11 Am. B. R. 646.

<sup>50.</sup> *In re Scanlon*, supra.

<sup>51.</sup> *In re Greenwald*, 3 Am. B. R. 606, 99 Fed. 705. *In re Lawlor*, 5 Am. B. R. 184, 110 Fed. 135, is not

thought a reliable authority, for reasons given ante.

<sup>52.</sup> *In re Grubbs-Wiley Co.*, 2 Am. B. R. 442, 96 Fed. 183; *In re Carolina Cooperage Co.*, 3 Am. B. R. 154, 96 Fed. 950.

<sup>53.</sup> *In re Mayer*, 4 Am. B. R. 119, 101 Fed. 227.

<sup>54.</sup> *In re Flick*, 5 Am. B. R. 465. See also *In re Kings Co.*, 7 Am. B. R. 619, 113 Fed. 120.

<sup>54a.</sup> *In re Gurewitz*, 10 Am. B. R. 350 (C. C. A.), 121 Fed. 982.

<sup>55.</sup> See "Priorities versus Liens," ante.

<sup>55a.</sup> *In re Lewis*, 4 Am. B. R. 51; *Matter of Slomka*, 9 Am. B. R. 635 (C. C. A.), 122 Fed. 630.

## Subs. b (5).] Fees and Expenses of General Assignees and Receivers.

the state law gives the priority, the same must be recognized in the bankruptcy proceedings.<sup>56</sup> There are few precedents under the former law; it gave priority to those persons entitled to it under the laws of the United States alone.

*Illustrative Cases.*—There is some confusion in the cases and they cannot always be reconciled.<sup>57</sup>

*Liens.*—As previously stated, mere liens are not priorities. They stand or fall as liens. As where under a statute a distress for rent creates a lien upon the property distrained, the lessor has no lien upon the property if the proceeding was instituted after the lessee was adjudicated a bankrupt, but is entitled to his rent as a preferred claim out of the proceeds of the sale of the property.<sup>57a</sup> Other cases illustrating this distinction will be found in the foot-note.<sup>58</sup>

*Fees and Expenses of General Assignees and Receivers and Their Attorneys.*—A general assignment for the benefit of creditors is not in itself a fraudulent act although it is an act of bankruptcy, and if such an assignment be honestly made for the purpose of applying all the assignor's property to the payment of his debts, the assignee who accepts the trust in good faith and executes it intelligently, successfully and honestly, is entitled to be paid a fair and reasonable compensation for his services and those of his attorneys, out of the assets turned over by him to the trustee in bankruptcy of his assignor.<sup>59</sup> But it must appear that the services rendered were an actual benefit to the estate,<sup>60</sup> and that the assignment was not made for the purpose of avoiding inevitable bankruptcy.<sup>60a</sup> If the assignment be actually fraudulent, and the assignee be a party to the fraud, he has no right to priority in bankruptcy proceedings,<sup>61</sup> nor, indeed,

56. Compare *In re Falls City, etc.*, 3 Am. B. R. 437, 98 Fed. 592; *In re Worcester Co.*, 4 Am. B. R. 497, 102 Fed. 808; *In re Crow*, 7 Am. B. R. 545.

57. In addition to the cases cited in the succeeding paragraphs, see *In re Wright*, 2 Am. B. R. 592, 95 Fed. 807; *In re Goldstein*, 2 Am. B. R. 603; *In re Daniels*, 6 Am. B. R. 699, 110 Fed. 745; *In re Matthews*, ante; *In re Myers*, 4 Am. B. R. 536, 102 Fed. 869.

57a. *In re Duple*, 9 Am. B. R. 121, 117 Fed. 794.

58. *In re Kerby-Dennis Co.*, 2 Am.

B. R. 402, 95 U. S. 116; *In re Lowensohn*, 4 Am. B. R. 79, 101 Fed. 776; *In re Emslie*, 4 Am. B. R. 126, 102 Fed. 291; *In re Mitchell*, 8 Am. B. R. 324, 116 Fed. 87.

59. *Summers v. Abbott*, 10 Am. B. R. 254 (C. C. A.), 122 Fed. 36.

60. *In re Zier & Co.*, 11 Am. B. R. 527, 127 Fed. 399.

60a. *Matter of Congdon*, 11 Am. B. R. 219, 129 Fed. 478.

61. *In re McCauley*, 2 N. B. N. Rep. 1089; *Stearns v. Flick*, 4 Am. B. R. 723, 103 Fed. 919; *Wilbur v. Watson*, 7 Am. B. R. 54, 111 Fed. 493; *In re Chace*, 10 Am. B. R. 677, 124

to prove a claim as a general creditor. There are rulings to the effect that if an assignee has been permitted by the court to retain possession of the property assigned from the filing of the petition in bankruptcy until the adjudication, he is entitled to compensation as a *quasi* receiver.<sup>61a</sup> The United States Supreme Court has disapproved the doctrine that a general assignment for creditors, valid under a state statute, is constructively fraudulent, and has held that a claim for services rendered by or for an assignee, which were beneficial to the estate, is entitled to priority of payment, and that a charge for preparing the necessary papers for the assignment is a provable debt, but that a charge for services in resisting an adjudication in bankruptcy against the assignor is not provable.<sup>61b</sup> There is, perhaps, a distinction between a corporation which cannot file a voluntary petition and one which can; but the distinction may be overcome by recalcitrancy, evidencing an intent to deprive creditors of rights given them by the federal laws.<sup>62</sup> The same test would doubtless determine the right of a receiver of an insolvent corporation<sup>63</sup> — he being technically named by the state court — to the fees allowed by the state law; though since such a receivership is now an act of bankruptcy,<sup>64</sup> the strict rule applicable to general assignees may apply instead. But if the fees have been actually paid to the assignee, before notice of bankruptcy or in pursuance of an order of a court, the trustee in bankruptcy cannot proceed to collect summarily; he must collect by suit.<sup>65</sup> What goes before does not, of course, apply where the assignment or receivership is more than four months before the bankruptcy; in such a case, the administration continues in the state court.

*Sheriff's Fees.*—One of the most difficult questions which has arisen under the present law is whether a sheriff has priority for his fees and disbursements after the property seized by him vests,

Fed. 753; *Matter of Harson*, 11 Am. B. R. 514. For case of doubtful authority where fees paid were not disturbed, see *In re Scholtz*, 5 Am. B. R. 783.

<sup>61a</sup> *Matter of Harson*, 11 Am. B. R. 514; *Matter of Gladding Co.*, 9 Am. B. R. 171, 120 Fed. 209.

<sup>61b</sup> *Randolph v. Scruggs*, 190 U. S. 533, 10 Am. B. R. 1; *Summers v. Abbott*, 10 Am. B. R. 258 (C. C. A.), 122 Fed. 36.

<sup>62</sup> See *In re Lock-Stub Check Co.*, 5 Am. B. R. 106; *In re Peter Paul Book Co.*, 5 Am. B. R. 105, 104 Fed. 786.

<sup>63</sup> Compare *Mauran v. Crown, etc., Co.*, 6 Am. B. R. 734.

<sup>64</sup> See § 3-a (4), as amended in 1903.

<sup>65</sup> *Comingor v. Louisville Trust Co.*, 184 U. S. 18, 7 Am. B. R. 421. Compare *In re Klein & Co.*, 8 Am. B. R. 559, 116 Fed. 523.

Subs. b (5).]

Sheriff's Fees.

clear of the lien of the execution or attachment, in the bankrupt's trustee. As a rule, a sheriff must proceed under an execution or warrant of attachment delivered to him; in case he seizes, he must insure and safely keep the property; he may be liable in damages if he fails so to do. Yet, if the lien of his attachment or execution is avoided by a bankruptcy within four months, he is obliged to surrender to the trustee, and, it has been claimed, without right even to reclaim his disbursements.<sup>66</sup> On the other hand, the creditor represented by the sheriff was probably seeking to obtain an advantage,<sup>67</sup> and the general creditors should not be compelled to pay his bill. Thus, if the lien creditor or his attorney is not financially responsible, the sheriff may fall between two stools. The equities — of the sheriff on the one hand and of the general creditors on the other — are equally strong, though the rules discussed in the two previous paragraphs do not apply, the sheriff not being a willing party to a fraud on the law as are usually a general assignee and his attorney. The question is not yet authoritatively settled. Cases under the former law quite uniformly went against the sheriff.<sup>68</sup> Those under the present law quite evenly balance.<sup>69</sup> It is impossible, however, to distinguish them, and to suggest therefrom the following tests which, when applied to a given case, may aid in determining the sheriff's right to payment in full: (1) has the sheriff a lien for his fees at the time the petition is filed; (2) if so, is it a lien that survives the bankruptcy? In either event, the property comes to the trustee charged with such lien and the sheriff's fees must be paid. Or, if the sheriff has no lien or it is avoided by the bankruptcy, (3) is there any state statute that gives the sheriff a priority? If not, his claim to priority for his fees will be disallowed. It is important to note that a sheriff's lien or priority may exist and yet the creditor's fail. In the ultimate analysis, the question turns solely on what the state law is.

66. *In re Young*, 2 Am. B. R. 673, Housberger, Fed. Cas. 6,734; *Platt v. Stewart*, Fed. Cas. 11,220; *In re*

67. See, generally, under Sections Sixty and Sixty-seven. *Foster*, Fed. Cas. 4,960.

68. *In re Davis*, Fed. Cas. 3,616; *Zeiber v. Hill*, Fed. Cas. 18,206; *In re Fortune*, Fed. Cas. 4,955; *In re Preston*, Fed. Cas. 11,394; *In re Jenks*, Fed. Cas. 7,276; *In re Ward*, Fed. Cas. 17,145; *In re Hatje*, Fed. Cas. 6,215. Apparently contra, *In re*

69. *In re Lewis*, 4 Am. B. R. 51, 99 Fed. 935; *In re Beaver Coal Co.*, 7 Am. B. R. 542, 113 Fed. 889, affirming s. c., 6 Am. B. R. 404, 107 Fed. 98; *In re Young*, supra; *In re Allen*, 3 Am. B. R. 38, 96 Fed. 512. For a review of the cases, see *In re Jennings*, 8 Am. B. R. 358.

*Sheriff's Disbursements.*— These may sometimes be paid when his fees are not. This, however, again on the theory that he is a custodian or that his service has been beneficial to the estate, *i. e.*, under § 64-b (1).<sup>70</sup> The cases under the law of 1867 are quite numerous and are still authorities.<sup>71</sup>

### III. Subs. c. DISPOSITION OF PROPERTY ON REVOCATION OF DISCHARGE OR COMPOSITION.

**Cross-Reference.**— This subsection seems much out of place here. It has already been considered under Sections Thirteen and Fifteen.

**70.** Compare *In re Lengert Wagon Co.*, 6 Am. B. R. 535, 110 Fed. 927; *In re Francis-Valentine Co.*, 2 Am. B. R. 522, 94 Fed. 793.

**71.** *In re Fortune*, ante; *In re Ward*, ante; *In re Jenks*, ante; *Zeiber v. Hill*, ante; *In re Holmes*, Fed. Cas. 6,631.

## SECTION SIXTY-FIVE.

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### DECLARATION AND PAYMENT OF DIVIDENDS.

§ 65. Declaration and Payment of Dividends.— *a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

*b* The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed, equals \* five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.\**

*c* The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

*d* Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

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\*Amendments of 1903 in italics.

*e* A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

**Analogous provisions: In U. S.:** *As to first and subsequent dividends*, Act of 1867, §§ 27, 28, R. S., §§ 5092, 5093; Act of 1841, § 10; Act of 1800, §§ 29, 30; *As to filing accounts preparatory to final dividend*, Act of 1867, § 27, R. S., § 5096; *As to rights of creditors whose claims are allowed after first dividend*, Act of 1867, § 28, R. S., § 5097; Act of 1841, § 10.

**In Eng.:** Act of 1883, §§ 58-63; General Rules 232-234, 273 (11) (12).

**Cross references: To the law:** §§ 39-a (1); 47-a (4) (9); 55-f; 57; 58-a (5) (6); 66.

**To the General Orders:** XXIX.

**To the Forms:** Nos. 40, 41.

## SYNOPSIS OF SECTION.

- I. Declaration and Payment of Dividends.
  - Comparative Legislation.
  - Cross References.
- II. Subs. a. On What Dividends Shall be Declared.
  - In General.
- III. Subs. b. First and Subsequent Dividends.
  - Time and Amount.
    - Amendment of 1903.*
    - Practice.*
    - Illustrative Cases.*
  - Subs. e. Creditors Entitled Only to What the Bankruptcy Law Gives Them.
- IV. Subs. c. Rights of Creditors Whose Claims Are Allowed Subsequent to Payment of Dividends.
  - In General.
- V. Subs. d. Preference to Residents of the United States.
  - In General.

## I. DECLARATION AND PAYMENT OF DIVIDENDS.

**Comparative Legislation.**—The English law is and our law of 1867 was far more elaborate in their provisions on this subject. Some



useful suggestions will be found in them.<sup>1</sup> The present section differs from those of the former law chiefly in being more elastic. Dividends may now be declared at irregular intervals. The amount on hand, not the time elapsed since the bankruptcy, is the real test; though this rule has been somewhat modified by the proviso clauses added by the amendatory act of 1903.

**Cross References.**—Some of the subjects treated in this connection in the law of 1867 are found elsewhere in the present law. Thus, of the method of declaring dividends,<sup>2</sup> and of paying dividends;<sup>3</sup> also of the notice to creditors of the declaration and payment of dividends.<sup>4</sup> The meaning of "dividend" is also discussed in Section One of this work; the disposition of unclaimed dividends is fixed by § 66.

## II. Subs. a. ON WHAT DIVIDENDS SHALL BE DECLARED.

**In General.**—The meaning of this clause has been much discussed. It has been held a definition of "dividends."<sup>5</sup> It is rather the declaration, found in all bankruptcy laws, that each creditor of the same class shall receive his *pro rata* of the bankrupt's assets.<sup>6</sup> The subsection was of considerable importance prior to the amendatory act of 1903; the cases, which are by no means uniform, are collected in the foot-note.<sup>7</sup> The status of creditors entitled to priority, and the order of payment has already been considered;<sup>8</sup> so also of secured creditors.<sup>9</sup> The former are never entitled to "dividends" in the restricted sense here employed; the latter only after they have realized on their securities or had their value otherwise determined.<sup>10</sup> But both classes are "creditors" as defined in § 1 (9), and for the purpose of computing commissions under §§ 40 and 48, as amended.

1. See "Analogous Provisions," ante.

2. § 39-a (1).

3. § 47-a (4) (9).

4. § 58-a (5).

5. See *In re Sabine*, 1 Am. B. R. 322.

6. *In re Gerson*, 2 Am. B. R. 352; *In re Barber*, 3 Am. B. R. 307, 97 Fed. 547.

7. *In re Sabine*, supra; *In re Fort Wayne Elec. Corp.*, 1 Am. B. R. 706; *In re Coffin*, 2 Am. B. R. 344; *In re Gerson*, supra; *In re Fielding*, 3 Am. B. R. 135, 96 Fed. 800; *In re Barber*, supra; *In re Utt*, 5 Am. B. R. 383, 105 Fed. 754.

8. Under Section Sixty-four.

9. Under Section Fifty-seven.

10. Compare *In re Little*, 6 Am. B. R. 681, 110 Fed. 621.

## III. Subs. b. FIRST AND SUBSEQUENT DIVIDENDS.

**Time and Amount.**—Here the statute is full and clear. It is thought to be mandatory. The first dividend must be declared within thirty days after the adjudication, if a dividend of five per cent. can (after deducting sufficient to pay priorities) be paid on all claims whether allowed or not. In doing so, claims scheduled but not yet allowed must be included.<sup>11</sup> The second dividend must, subject to the proviso clauses of the amendatory act of 1903, be declared as soon as there is enough to pay 10 per cent. more; and so on until the funds of the estate are entirely distributed. This accords with the policy of the law in hastening distribution. This policy is further emphasized by the provision that the judge, but not the referee, may declare dividends oftener and in smaller proportions. In all other cases, the referee declares the dividend<sup>12</sup> and orders it paid. The assignee (trustee) formerly did this; in England, the trustee does yet. But dividends can be declared only at meetings of creditors.

*Amendment of 1903.*—Since the amendatory act, the practice of declaring first and final dividend in small estates at one time is no longer possible.<sup>13</sup> Now, if any dividends are declared, there must be two, the second at least three months after the first. The first proviso, added by the amendatory act, is a further limitation. Not more than 50 per cent. of the cash on hand, in excess of money to be reserved or paid on priority debts and that held out for claimants who have not yet proven, can be disbursed in a first dividend. The meaning is not exactly clear. The purpose, however, is patent enough: to give creditors a longer time to prove and additional notice of their right to dividends.<sup>14</sup> The change is a mild reversal of the policy of the original law towards rapidity in administration. It applies only to cases begun on or after February 5, 1903.<sup>15</sup>

*Practice.*—The practice usually involves an order, reciting the giving of the statutory notice, the action of the creditors at the meeting, if any, and declaring a dividend at a specified per cent. on all

11. In re Scott, 2 Am. B. R. 324, 96 Fed. 607.

12. § 39-a (1).

13. See In re Smith, 2 Am. B. R. 648.

14. It perhaps minimizes certain evils, which grew out of a liberal construction of § 57-n.

15. See "Supplementary Section to Amendatory Act," post.

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Subs. e.]      Dividends on Claims Proved after First Dividend.

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claims allowed as shown on a dividend sheet annexed; it also should direct the trustee to pay the same.<sup>16</sup>

*Illustrative Cases.*— There are but few cases even under the former law. Some of them will be found in the foot-note.<sup>17</sup>

**Subs. e. Creditors Entitled Only to What the Bankruptcy Law Gives Them.**— This is the corollary of subsection a. General creditors are entitled each to his *pro rata*, but no more; secured creditors to their security and a *pro rata* of the balance, but no more. An apparent exception is that interest is sometimes paid on allowed claims; but this is only in case such claims have been paid in full, and there are assets still undistributed.<sup>18</sup> If anything then remains, it is returned to the bankrupt.

#### IV. Subs. c. RIGHTS OF CREDITORS WHOSE CLAIMS ARE ALLOWED SUBSEQUENT TO PAYMENT OF DIVIDENDS.

**In General.**— There was a corresponding clause in the former law. Claims cannot be allowed after one year after the adjudication;<sup>19</sup> thus, the list of creditors entitled to share is fixed at that time. Prior to the amendments of 1903, it was held that if a dividend had been paid within the year, such dividend and payment should not be disturbed or a creditor compelled to return what he has received, even that an expense of administration which was overlooked may be paid.<sup>20</sup> Such a contingency can rarely arise. As the law now is, a like dividend on such subsequent claims and such expenses must be paid before a further dividend is declared. These provisions, coupled with those of subsection b, demonstrate that, when the first dividend is three months old, it is improper to delay the payment of a final dividend merely because certain creditors have not filed their claims.<sup>21</sup>

16. See under Section Forty-seven, ante.

17. In re Walker, 3 Am. B. R. 35, 96 Fed. 550; In re James, Fed. Cas. 7,175; Bristol v. Sanford, Fed. Cas. 1,893; Atkinson v. Kellogg, Fed. Cas. 613; In re Sheehan, Fed. Cas. 12,737; In re Haynes, Fed. Cas. 6,269.

18. In re Hagan, Fed. Cas. 5,898;

In re Town, Fed. Cas. 14,112; In re Bank, etc., Fed. Cas. 895.

19. § 57-n.

20. Clafin v. Eason, 2 Am. B. R. 263; In re Hegerty, 2 N. B. N. Rep. 1083; In re Smith, Fed. Cas. 12,989; In re N. Y. Mail, etc., Co., Fed. Cas. 10,212.

21. In re Stein, 1 Am. B. R. 662, 94 Fed. 124.

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Preference to Residents in United States.

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[§ 65.]

Cases will still often be closed before the year for filing claims has elapsed.

V. Subs. d. PREFERENCE TO RESIDENTS OF THE UNITED STATES.

**In General.**— This subsection applies only to cases where the bankrupt has been so adjudged not only in the United States but in a foreign country. It is intended to accomplish equality of payment to resident creditors, wherever the law of such a country does not permit such residents to prove thereon. The subsection is rarely available and requires no discussion.

## SECTION SIXTY-SIX.

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### UNCLAIMED DIVIDENDS.

§ 66. **Unclaimed Dividends.**— *a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

*b* Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

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**Analogous provisions:** In U. S.: None.

In Eng.: Act of 1883, § 162; General Rules 345, 346A.

**Cross references:** To the law: §§ 12; 65.

To the General Orders: None.

To the Forms: None.

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### I. Subs. a, b. UNCLAIMED DIVIDENDS.

**Comparative Legislation.**— This section is new. There was nothing like it in our previous laws. The English statute requires the payment of unclaimed dividends into the Bank of England, where they remain subject to the demands of the creditors entitled thereto and the orders of the Board of Trade.<sup>1</sup> There seems to be no provision in that act for a distribution among creditors who have already claimed and had their dividends.

**In General.**— The practice here is simple. If for any reason a creditor entitled to a dividend does not accept it, the trustee must wait until six months after the declaration of the final dividend and

1. Act of 1883, § 162.

then pay the money into court. If such dividends are not claimed for one year after the final dividend is declared, the same must be distributed to creditors whose claims have been allowed but not paid in full, or, after they are paid, to the bankrupt. The purpose clearly is to distribute every dollar declared by way of dividends, that there may be no bankruptcy funds "in chancery," as under our law of 1867<sup>2</sup> and the present English law. The saving clause as to dividends due minors should be noted. While the consideration deposited for the purpose of carrying out a composition<sup>3</sup> is not strictly dividends, good practice would seem to require the deposit of the unclaimed funds in such a proceeding in a special account and its ultimate distribution as suggested by subsection b.<sup>4</sup>

**Illustrative Cases.**— There are but few cases. Some of them will be found in the foot-note.<sup>5</sup>

2. See remarks of Philips, J., in *In re Fielding*, 3 Am. B. R. 135, 96 Fed. 800.

3. § 12-b-e.

4. For practice on "Payments of Moneys Deposited," See General Order XXIX.

5. In *re Fielding*, *supra*. As to the method of distribution now fixed by subs. b, see *In re Haynes*, Fed. Cas. 6,269; *In re James*, Fed. Cas. 7,175. Somewhat contra, *In re Hoyt*, Fed. Cas. 6,806. Compare also *In re Blight*, Fed. Cas. 1,540. And see *In re Bridgman*, Fed. Cas. 1,867.

## SECTION SIXTY-SEVEN.

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### LIENS.

§ 67. **Liens.**— *a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

*b* Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

*c* A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

*d* Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

*e* That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.\**

*f* That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same

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\* Amendment of 1903 in italics.



§ 67.]

Analogous Provisions; Synopsis of Section.

may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

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**Analogous provisions:** In U. S.: *As to fraudulent transfers*, Act of 1867, § 35, R. S., § 5129; *As to liens which are unaffected*, Act of 1867, § 20, R. S., § 5075; Act of 1841, § 2; Act of 1800, § 63; *As to dissolution of attachment liens*, Act of 1867, § 14, R. S., § 5044.

In Eng.: None.

**Cross references:** To the law: §§ 1 (15) (25); 2 (7) (15); 3-a (1) (2) (3); 14-b (4); 60-a-b; 70-e.

To the General Orders: General Order XXVIII.

To the Forms: No. 43.

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## SYNOPSIS OF SECTION.

### I. Scope and Meaning.

Comparative Legislation.

Scope of Section.

*In General.*

*Cross References.*

### II. Subs. a. Claims Void for Want of Record.

State Law Controls.

Illustrative Cases.

### III. Subs. b. Subrogation of Trustee to Rights of Creditors.

Trustee Only Can Sue.

Is the Trustee a "Judgment Creditor?"

### IV. Subs. d. Valid Liens.

In General.

Miscellaneous Valid Liens.

*Mechanics' Liens.*

*Landlords' Liens.*

*Other Valid Liens.*

Effect of Valid Liens on Distribution.

**V. Subs. e. Fraudulent Transfers and Liens.**

Scope of Subsection.

Insolvency Not Essential.

"Within Four Months Prior to Filing the Petition."

"With Intent to Hinder, Delay, or Defraud."

"Except Purchasers in Good Faith and for a Present Fair Consideration."

Transfers and Incumbrances Void under State Laws.

Suits to Recover Property.

*Amendment of 1903.*

Miscellaneous Invalid Transfers or Incumbrances.

*Mortgages to Secure Antecedent Debts.**Chattel Mortgages.**Voluntary Settlements.**General Assignments.*

Practice.

**VI. Subs. c, f. Liens through Legal Proceedings.**

Comparative Legislation.

Confusion Concerning Subs. c and Subs. f.

*When Subs. c. Applies.*

Insolvency Essential.

"Four Months Prior to the Filing of the Petition."

Miscellaneous Invalid Liens through Legal Proceedings.

*By Judgment and Execution.**By Attachment.**By Creditor's Bill.*

Practice on Suits to Annul Liens.

Preserving Liens.

Saving Clause.

**I. SCOPE AND MEANING.**

**Comparative Legislation.**—Here the Act of 1898 is much more explicit than any previous bankruptcy law. In England, while a fraudulent transfer is an act of bankruptcy,<sup>1</sup> there is no statutory provision that such a transfer is void. Nor is that statute any more explicit as to liens, save those available as acts of bankruptcy. The only lien through legal proceedings in terms dissolved by bankruptcy under our law of 1867, was that of an attachment on *mesne* process. Fraudulent transfers, on the other hand, were interdicted,<sup>2</sup> but were made up of elements more numerous and difficult of proof than those specified in the present law. Much of the section under

1. Act of 1883, § 4 (1) (b).

2. § 35, R. S., § 5129.

discussion is new. Indeed, the law of 1898 is, in this particular, far more favorable to the creditor than was that of 1867.

**Scope of Section.**— Starting with the well-recognized doctrine that a trustee in bankruptcy merely steps into the bankrupt's shoes and, therefore, takes his property subject to all valid liens,<sup>3</sup> the statute proceeds to declare what liens are not to be considered valid, as, in substance, (1) those which are invalid under the laws of a State,<sup>4</sup> and, provided they are less than four months old, (2) those which were not recorded or are invalid "for other reasons,"<sup>5</sup> (3) those which were given with intent to hinder, delay, or defraud creditors,<sup>6</sup> and (4) those which were obtained through legal proceedings;<sup>7</sup> with the further proviso that even liens so declared invalid shall not be so as to *bona fide* purchasers without notice. While somewhat out of place in this section, the allied subject of fraudulent transfers is here interdicted in much the same way; they are null and void as to creditors, if made by an insolvent with intent to hinder, delay, or defraud and within four months of the bankruptcy. The section also phrases the doctrine of subrogation with regard to liens which, because declared void, a mere creditor cannot enforce. Read together, its various paragraphs and salient features make the section consistent and far-reaching in the extreme.

*In General.*— The following generalizations may also be made: Liens more than four months before the bankruptcy are, unless fraudulent, not affected;<sup>8</sup> no more are liens acquired after the bankruptcy.<sup>9</sup> On the other hand, while subdivision e is in itself a statute of limitations on fraudulent transfers, if the transfer is also interdicted by the law of the State, it may, under § 70-e, be attacked within the much longer period fixed by the state statute.<sup>10</sup> Further, while liens through legal proceedings within the four months' period are dissolved by bankruptcy, other liens are not, unless the lienor

3. Compare subs. d, post. See *Continental Bank v. Katz*, 1 Am. B. R. 19; *In re Moore*, 6 Am. B. R. 175, 107 Fed. 234; *Ex parte Christy*, 3 How. 292; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Stewart v. Platt*, 101 U. S. 731; *In re Stuyvesant Bank*, 49 How. Pr. 133.

4. *In re Davis*, Fed. Cas. 3,618; *Peck v. Jenness*, 7 How. 612; *Downer v. Brackett*, 21 Vt. 599.

5. Subs. a.

6. Subs. e.

7. Subs. c, f.

8. *In re Dunavant*, 3 Am. B. R. 41, 96 Fed. 542; *Doe v. Childress*, 21 Wall. 642.

9. *Kinmouth v. Braeutigam*, 4 Am. B. R. 344; *In re Engle*, 5 Am. B. R. 372, 105 Fed. 893.

10. *In re Adams*, 1 Am. B. R. 94; *In re Dunavant*, 3 Am. B. R. 41, 96 Fed. 542.

was insolvent at the time and there was "intent to hinder, delay, or defraud."<sup>11</sup> It follows also that a trustee, not being a purchaser for value,<sup>12</sup> not only stands in the shoes of the bankrupt as to his property, but, as the representative of creditors, may sue to avoid the effect of the bankrupt's acts.<sup>13</sup> But the trustee does not represent creditors who are secured by valid liens; and, therefore, he has no interest in the respective rights of priority of such creditors.<sup>14</sup> It has also been held that, where a valid lien is incident to a debt and the debt is discharged, the lien nevertheless remains.<sup>15</sup>

*Cross References.*—This section is closely connected with both § 60-a-b, on voidable preferences, and § 70-e, on fraudulent transfers voidable under the state law; somewhat less closely with § 3-a (1), § 3-a (2), and § 3-a (3), where similar transactions are declared acts of bankruptcy; while, by § 14-b (4), a fraudulent transfer as defined in words almost identical with those in subsection e, is made an objection to discharge. What is said in the appropriate paragraphs under the corresponding Sections of this work should be consulted here.

## II. Subs. a. CLAIMS VOID FOR WANT OF RECORD.

**State Law Controls.**—This subsection should be read in connection with the next to the last sentence in subsection e. Clearly the reference is to the state law. If not yet a lien, properly so called, under that law, as, for want of record or "for other reasons," it cannot be recognized in bankruptcy. This is the corollary of the proposition that the property of the bankrupt comes to the trustee charged with all valid liens. The subsection is merely declaratory of the law.

**Illustrative Cases.**—Where chattel mortgages are withheld from record contrary to the provisions of a statute for the purpose of enabling the mortgagor to preserve his credit, such mortgages are

11. See post under subs. e.

12. *Chattanooga Bank v. Rome Iron Co.*, 4 Am. B. R. 441, 102 Fed. 755. Contra, *In re Booth*, 3 Am. B. R. 574, 98 Fed. 975.

13. *In re Legg*, 96 Fed. 326; *In re Leigh*, 2 Am. B. R. 606; affirmed, 96 Fed. 806. Contra, *In re Ohio Co-*

operative *Shear Co.*, 2 Am. B. R. 775.

14. *Goldman v. Smith*, 2 Am. B. R. 104; *Jerome v. McCarter*, 94 U. S. 734.

15. *Bank of Commerce v. Elliott*, 6 Am. B. R. 409. Compare *Bracken v. Johnston*, Fed. Cas. 1,761.

Subs. a.]

Claims Void for Want of Record.

not entitled to priority of payment in bankruptcy over claims arising subsequent to the execution of the mortgages and before they were recorded.<sup>15a</sup> In some jurisdictions and under some statutes it must affirmatively appear in order to invalidate the mortgage that it was withheld from record by agreement, or that some prejudice resulted to creditors on account of its not having been filed for record.<sup>15b</sup> The object of recording acts is to prevent the obtaining of credit by reason of the ostensible ownership of property which in reality is covered by a secret lien by giving notice to those intending to purchase such property and to creditors who give credit on the faith thereof.<sup>15c</sup> Under the law in New York an unfiled chattel mortgage is void only as against judgment creditors of the mortgagor, and it has been held that a general creditor upon obtaining judgment and issuing execution may impeach the validity of the mortgage for non-filing, although in the meantime it may have been filed,<sup>15d</sup> and it has also been held under the law of this state that the trustee of a bankrupt mortgagor could avoid the mortgage for failure to file, only to the extent of the claims of judgment creditors who were at the time of the adjudication in a position to enforce their claims against the property.<sup>15e</sup> The cases are numerous which involve the question of the validity of unfiled or unrecorded chattel mortgages or conditional sales as against general or judgment creditors of the bankrupt. The determination of the question must necessarily depend upon the statutes and decisions

15a. *Clayton v. Exchange Bank of Macon*, 10 Am. B. R. 173, 121 Fed. 630; *Guras v. Porter*, 9 Am. B. R. 271, 118 Fed. 668; *In re Andrae Co.*, 9 Am. B. R. 135, 117 Fed. 561.

15b. *Deland v. Miller & Cheney Bank*, 11 Am. B. R. 744, 119 Iowa, 368; *In re Williams*, 9 Am. B. R. 731, 120 Fed. 542.

15c. *In re Cannon*, 10 Am. B. R. 64, 121 Fed. 582. See *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. Ed. 393, where Chief Justice Marshall says: "There is not perhaps a state in the Union, the laws of which do not make all conveyances not recorded and all secret trusts void as to creditors, as well as subsequent purchasers without notice, To sup-

port the secret lien of a vendor against a creditor who is a mortgagee, would be to counteract the spirit of these laws."

15d. *In re Beede*, 11 Am. B. R. 387, 12 Fed. 853, in which case Judge Ray considered at length and in full all the New York authorities applicable to the validity of unfiled chattel mortgages.

15e. *In re New York Economical Printing Co.*, 6 Am. B. R. 615, 110 Fed. 514; *In re Beede*, 11 Am. B. R. 387, 126 Fed. 853; *Matter of Thompson*, 10 Am. B. R. 242, 122 Fed. 174. But see *Gove v. Morton Trust Co.*, 12 Am. B. R. 297, 96 App. Div. (N. Y.) 177.

of the several states,<sup>15f</sup> and they do not, therefore, admit of ready classification. A number of these cases are cited in the note.<sup>16</sup>

### III. Subs. b. SUBROGATION OF TRUSTEE TO RIGHTS OF CREDITORS.

**Trustee Only Can Sue.**—This doctrine has already been considered. The subsection is doubtless declaratory of the law.<sup>17</sup> Its words are too clear and their purpose too apparent to require discussion. Cases in point will be found in the foot-note.<sup>18</sup>

**Is the Trustee a "Judgment Creditor?"**—This is in doubt. The majority of cases under the law of 1867 held that, since the bankruptcy arrests proceedings in the state courts, the assignee (trustee), as the representative of the whole body of creditors, could bring any of that class of equitable actions where the existence of a judgment and execution returned unsatisfied are necessary elements; *i. e.*, that he was in effect, if not in name, a judgment creditor.<sup>19</sup> This has been thought still the rule,<sup>20</sup> especially in view of the words, "may enforce such rights of such creditor for the benefit of the estate." The phrasing of § 70-e, limiting actions to avoid transfers to such suits as a creditor could have brought, has, however, again opened the question. Thus, it has

15f. In *re* Beede, 11 Am. B. R. 387, 126 Fed. 853; In *re* Andrae Co., 9 Am. B. R. 135, 117 Fed. 561; In *re* Antigo Screen Deer Co., 10 Am. B. R. 359, 123 Fed. 249.

16. In *re* Yukon Woolen Co. (Conn.), 2 Am. B. R. 805, 96 Fed. 326; In *re* Wright (Ga.), 2 Am. B. R. 364, 96 Fed. 187; In *re* Harrison (N. Y.), 2 N. B. N. Rep. 541; In *re* Booth (Ore.), *supra*; In *re* Tatem et al. (N. C.), 6 Am. B. R. 426, 110 Fed. 519; In *re* N. Y. Econ. Printing Co. (N. Y.), 6 Am. B. R. 615, 110 Fed. 514; In *re* Sewell (Ky.), 7 Am. B. R. 133, 111 Fed. 791; In *re* Wilkes (Ark.), 7 Am. B. R. 574, 112 Fed. 975; In *re* Pekin Plow Co. (Neb.), 7 Am. B. R. 369, 112 Fed. 308; In *re* Hill (Vt.), 8 Am. B. R. 302, 115 Fed. 858; Duplan Silk Co. v. Spencer (Pa.), 8 Am. B. R. 367; In *re* Josephson (Ga.), 8 Am. B. R. 423, 116 Fed. 404; In *re* Gosch (Ga.), 12 Am. B. R. 149, 126 Fed. 627, reversing 9 Am. B. R. 610; In *re* Rabenan, 9 Am. B. R. 180; and other

cases to be found post. See, for instance, sub nom. "Mechanics' Liens," "Chattel Mortgages," "By Judgment and Execution," "By Creditors' Bill," etc.

17. Compare In *re* Yukon Woolen Co., 2 Am. B. R. 805, 96 Fed. 326.

18. In *re* Kenney, 3 Am. B. R. 353, 97 Fed. 554; In *re* Boston, 3 Am. B. R. 388; In *re* Howland, 6 Am. B. R. 495, 109 Fed. 869; Barnes Mfg. Co. v. Norden, 7 Am. B. R. 553; Patten v. Carley, 8 Am. B. R. 482.

19. Barker v. Barker's Assignee, Fed. Cas. 986; Beecher v. Clark, Fed. Cas. 1,223; In *re* Duncan, Fed. Cas. 4,131; In *re* Metzger, Fed. Cas. 9,510. Contra, In *re* Collins, Fed. Cas. 3,007; Cook v. Whipple, 55 N. Y. 150. But see post in this paragraph. Compare Platt v. Stewart, Fed. Cas. 11,220, as reversed as Stewart v. Platt, 101 U. S. 731.

20. Compare In *re* McNamara, 2 N. B. N. Rep. 341; In *re* Harrison, 2 N. B. N. Rep. 541.

## Subs. d.]

## Valid Liens.

been held in a well-considered case,<sup>21</sup> that only a judgment creditor can share in property of the bankrupt, affected by a chattel mortgage not duly refiled as provided in the New York statute, *i. e.*, that the trustee is a judgment creditor only so far as he represents judgment creditors, the New York law denying to creditors whose debts are not reduced to judgment the remedy of a suit to set it aside. This confusion is, however, less serious to the administration of bankruptcy estates than at first appears. There can be no doubt about the trustee's power to sue to set aside a transaction which amounts to a fraud in fact, whether on the law or on the creditors; and that, too, irrespective of whether any of the creditors had obtained judgments. Where, however, the wrong on creditors is purely constructive, and the remedy is denied until certain statutory preliminaries are observed, the case is different. The creditor whose debt is not in judgment can, of course, complain that the bankruptcy prevents him from observing those preliminaries, but, in a vast majority of cases, the judgment creditors may rejoin that the complaining creditor might have had a judgment had he been vigilant and is, therefore, not in a position to ask equity. Such a distinction would harmonize with the doctrine that the trustee takes the assets in the "plight and condition" they were the day of bankruptcy. In this view, the confusion noted will resolve itself into the old-time test of diligence as opposed to *laches*. On the whole this is unfortunate. The courts may, however, be relied on ultimately to bring the law back to the rule under the act of 1867.

## IV. Subs. d. VALID LIENS.

**In General.**—This subsection is also declaratory of the law. It is the converse of subsections c, e and f, and is emphasized by subsection b, the saving clause in the body of subsection e and the proviso clause at the end of subsection f. It is much broader than the corresponding clauses of the act of 1867, which protected liens by mortgage only.<sup>22</sup> The supreme test of validity is, of course, "good faith."<sup>23</sup> Want of present consideration or failure to record where record is necessary to impart notice are also

<sup>21</sup> In re Economical Pr. Co., 6 Am. B. R. 615, 110 Fed. 514. Compare In re Schmitt, 6 Am. B. R. 150; affirmed as In re Shirley, 7 Am. B. R. 299.

<sup>22</sup> § 14, R. S., § 5052.

<sup>23</sup> In re Soudans Mfg. Co., 8 Am. B. R. 45, 113 Fed. 804.

important.<sup>24</sup> These are often elements of proof on the question of *bona fides*. As will soon be seen, however, *bona fides* is not material where the lien is through legal proceedings. The universal recognition of the rule of law here phrased into the statute results in cases construing it being rare, perhaps unnecessary.

**Miscellaneous Valid Liens.**—The rule seems to be that where the lien does not contravene the bankruptcy law, and is recognized by the state law, it will be preserved.<sup>25</sup>

**Mechanics' Liens.**—Here there was some question under the former law.<sup>26</sup> There is now none under the present.<sup>27</sup> Such a lien is not one through legal proceedings<sup>27a</sup> and, unless so, cannot be attacked, save for intention to hinder, delay, or defraud, an element not likely to appear in liens of this class. It seems even that such a lien may be perfected after bankruptcy.<sup>28</sup> A laborer's or materialman's lien for labor performed for, or materials furnished to, a subcontractor is not affected by the bankruptcy of the subcontractor.<sup>28a</sup> Akin to this subject are all liens which or whose priority rests on special statutes.<sup>29</sup>

24. Compare subs. a; In re Soudans Mfg. Co., *supra*; In re Durham, 8 Am. B. R. 115, 114 Fed. 750.

25. Compare In re Lowensohn, 4 Am. B. R. 79, 100 Fed. 776; In re Alverson, 5 Am. B. R. 855; In re Byrne, 3 Am. B. R. 268; In re Grevy, 7 Am. B. R. 459, 461, 112 Fed. 957, 959. See In re West Norfolk Lumber Co., 7 Am. B. R. 648, 112 Fed. 759; McNair v. McIntyre, 7 Am. B. R. 638, 113 Fed. 113; Evans v. Rounsaville, 8 Am. B. R. 236. Compare also Harvey v. Smith, 7 Am. B. R. 497; In re Standard Laundry Co., 8 Am. B. R. 538, 116 Fed. 476; In re Klapholz, 7 Am. B. R. 703; Clark v. Iselin, 21 Wall. 360; In re Hutto, Fed. Cas. 6,960; In re N. Y. Mail, etc., Co., Fed. Cas. 10,209; In re Dunkerson, Fed. Cas. 4,156; Gardner v. Cook, Fed. Cas. 5,226.

26. In re Dey, Fed. Cas. 3,871; In re Coulter, Fed. Cas. 3,276; Sabin v. Connor, Fed. Cas. 12,197; In re Cook, Fed. Cas. 3,151.

27. In re Kirby-Dennis, 2 Am. B. R. 402, 95 Fed. 166, affirming s. c., 2 Am. B. R. 218, 94 Fed. 818; In re Emslie, 4 Am. B. R. 126, 102 Fed.

291, reversing s. c., 3 Am. B. R. 282, 97 Fed. 929. See also In re Coe-Powers Co., 6 Am. B. R. 1; In re Beck Prov. Co., 2 N. B. N. Rep. 532.

27a. Howard v. Cunliff, 10 Am. B. R. 71 (Mo. App.); In re Emslie, 4 Am. B. R. 426, 102 Fed. 292.

28. In re Huston, 7 Am. B. R. 92.

28a. Crane Co. v. Smythe, 11 Am. B. R. 747, 94 App. Div. (N. Y.) 53; Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619, 9 Am. B. R. 778, note. See contra, Matter of Roeber, 9 Am. B. R. 303 (C. C. A.), 121 Fed. 449, reversing 9 Am. B. R. 778, holding that a trustee in bankruptcy takes title to the money due to a bankrupt under a building contract, free from the liens of subcontractors for labor and materials furnished for the building, although the notices of lien were filed pursuant to the statute, but after the contractor had filed his petition in bankruptcy.

29. For instance, in cases like In re Matthews, 6 Am. B. R. 96, 109 Fed. 603; In re Gosch, 9 Am. B. R. 613, 121 Fed. 604. But see In re Falls City Shirt Co., 3 Am. B. R. 437, 98 Fed. 592.



Subs. d.]

Landlords' Liens; Other Valid Liens.

*Landlords' Liens.*—In some of the States, the lessor is given a lien, either after or before distraint for rent. The requirements of the state statute must be strictly observed or the lien will not be recognized.<sup>30</sup> If distraint is necessary and has not been resorted to, there is no lien.<sup>31</sup> Where a landlord's lien is not recognized by statute, a lien under a distress warrant is avoided by subsection f.<sup>32</sup> Even where such a lien is given, it is waived by the landlord taking a chattel mortgage for the rent.<sup>33</sup> And where a landlord consents to the sale of property to which his lien has attached in bulk with other property not affected thereby he loses his lien, since under such circumstances it would be impossible to determine how much of the proceeds of sale was the product of the property covered by his lien.<sup>33a</sup> Cases under the law of 1867 will be found in the foot-note.<sup>34</sup>

*Other Valid Liens.*—Mortgages given in good faith by way of continuing collateral are valid to the amount advanced before the petition is filed.<sup>35</sup> So also, it is thought, of mortgages purporting to cover property to be acquired.<sup>36</sup> A chattel mortgage is not void for indefiniteness of description which purports to be upon all property "now being and remaining in the possession" of the mortgagor.<sup>36a</sup> Nor does an agreement therein permitting the mortgagor to sell the mortgaged goods and use the proceeds thereof invalidate the mortgage, where no fraudulent intention is found; the only effect of such agreement is to withdraw the goods sold from the operation of the mortgage.<sup>36b</sup> An attorney's lien on the papers of his client,<sup>37</sup> and a bank's lien on the dividends to its stockholders who are debt-

30. See *Marshall v. Knox*, 16 Wall. 551.

31. In re *Ruppel*, 3 Am. B. R. 233, 97 Fed. 778.

32. In re *Dougherty*, 6 Am. B. R. 457, 109 Fed. 480.

33. In re *Wolf*, 3 Am. B. R. 558, 98 Fed. 84.

33a. *Keyser v. Wessel*, 12 Am. B. R. 126, 128 Fed. 281, affirming 10 Am. B. R. 586, and distinguishing *Carroll v. Young*, 9 Am. B. R. 643, 119 Fed. 577.

34. In re *Bowne*, Fed. Cas. 1,741; *Trim v. Wagner*, Fed. Cas. 14,174; *Bailey v. Loeb*, Fed. Cas. 739.

35. *Marvin v. Chambers*, Fed. Cas. 9,179. See *Davis v. Turner*, 9 Am. B. R. 704 (C. C. A.), 120 Fed.

605; In re *Williams*, 9 Am. B. R. 731, 120 Fed. 542; *Stedman v. Bank of Monroe*, 9 Am. B. R. 4, 117 Fed. 237.

36. *Barnard v. Norwich, etc., Co.*, Fed. Cas. 1,007; In re *Sentenne & Green Co.*, 9 Am. B. R. 648, 120 Fed. 436. Compare *Brett v. Carter*, Fed. Cas. 1,844.

36a. In re *Beede*, 11 Am. B. R. 387, 126 Fed. 853; *Davis v. Turner*, 9 Am. B. R. 704 (C. C. A.), 120 Fed. 605. See *Jones Chatt. Mortg.*, § 65.

36b. In re *Ball*, 10 Am. B. R. 564, 123 Fed. 164.

37. *Rogers v. Winsor*, Fed. Cas. 12,023; In re *N. Y. Mail, etc., Co.*, ante.

ors;<sup>38</sup> and the special lien given by a state statute to the manufacturer of machinery supplied to a factory,<sup>39</sup> are valid. A livery stable keeper's statutory lien does not depend for its existence upon the institution of judicial or other proceedings, but is a perfect lien under the statute, and as such is cognizable and enforceable in bankruptcy.<sup>39a</sup>

**Effect of Valid Liens on Distribution.**—If valid, the lienor becomes a secured creditor, and must be treated as such.<sup>40</sup>

#### V. Subs. e. FRAUDULENT TRANSFERS AND LIENS.

**Scope of Subsection.**—This subsection is somewhat out of place here. Its counterpart in the law of 1867 is both different in the minor matters of phrasing and the time limit, and in effect more favorable to the debtor than the present subsection. The important elements of proof in that law—the creditor's reasonable cause to believe the debtor insolvent and that the transaction was in fraud of the act—have given place to the single element of intent to hinder, delay, or defraud.<sup>41</sup> The former law here interdicted transfers<sup>42</sup> only. The present subsection has to do with incumbrances, too, at least so far as such liens result from the voluntary act of the debtor.<sup>43</sup>

**Insolvency Not Essential.**—Unlike fraudulent preferences, fraudulent transfers may, it seems, be made at a time when the transferrer is solvent.<sup>44</sup> But, intent to hinder, delay, or defraud being necessary, insolvency will usually be an element of proof.

**“Within Four Months Prior to Filing the Petition.”**—The meaning of these words is discussed elsewhere. The practitioner should

38. In re Dunkerson, ante. See also interesting case of Hutchinson v. Otis, 8 Am. B. R. 382, 115 Fed. 937.

39. In re Matthews, ante; In re Georgia Handle Co., 6 Am. B. R. 472, 109 Fed. 632; In re Oconee Milling Co., 6 Am. B. R. 475, 109 Fed. 866.

39a. In re Mero, 12 Am. B. R. 171, 128 Fed. 630; In re Pratesi, 11 Am. B. R. 319, 126 Fed. 588.

40. See under Section Fifty-seven, ante.

41. In re McLam, 3 Am. B. R. 245, 97 Fed. 922.

42. See § 1 (25) for elastic meaning now given the word.

43. That is mortgages, pledges, and the like, as distinguished from judgments, attachments, and other liens through legal proceedings.

44. Pollock v. Jones, 10 Am. B. R. 616 (C. C. A.), 124 Fed. 163. Compare In re McLam, 3 Am. B. R. 245, 97 Fed. 922; also In re Soudans Mfg. Co., 8 Am. B. R. 45, 113 Fed. 804.

Subs. e.]

Suits to Recover Property.

also note that, if the period has elapsed, there may still be a remedy under the state law, as pointed out by § 70-e.<sup>45</sup> But the words above quoted do not apply where the fraudulent transaction amounted to a voluntary gift.<sup>46</sup>

**"With Intent to Hinder, Delay or Defraud."**— These words here have their immemorial meaning.<sup>47</sup> They have already been considered in Section Three; also in Section Fourteen. The cases under the former law, found in the foot-note,<sup>48</sup> are thought still applicable, though in that statute used in defining an act of bankruptcy. Knowledge of, or participation in the fraud by the creditor to whom the transfer was made is not material.<sup>48a</sup> Illustrative cases under the present law are also cited in the foot-note<sup>49</sup> and under subsequent paragraphs.

**"Except Purchasers in Good Faith and for a Present Fair Consideration."**— This saves valid transfers,<sup>50</sup> as subsection d does valid liens.

**Transfers and Incumbrances under State Laws.**— The last sentence of the subsection is in line with the policy of the law. It adopts all state laws which interdict fraudulent transfers and liens, provided the acts complained of are within four months of the bankruptcy.<sup>50a</sup> Since § 70-e is broader and applies the period of limitation fixed by the state law, this sentence is of little importance.

**Suits to Recover Property.**— Though all fraudulent transfers or incumbrances are here declared null and void and, by § 70-a (4)

45. Compare *In re Adams*, 1 Am. B. R. 94; *In re Grahs*, 1 Am. B. R. 465; *In re Taylor*, 95 Fed. 956.

46. *In re Schenck*, 8 Am. B. R. 727, 116 Fed. 554.

47. See *Githens v. Schiffer Bros.*, 7 Am. B. R. 453, 112 Fed. 505.

48. *Sedgwick v. Place*, Fed. Cas. 12,620; *In re Cowles*, Fed. Cas. 3,297; *In re McKibben*, Fed. Cas. 8,859; *In re Williams*, Fed. Cas. 17,703; *Curran v. Munger*, Fed. Cas. 3,487.

48a. *Sherman v. Luckhardt*, 11 Am. B. R. 26 (Kans. Sup.).

49. *Carter v. Goodykoontz*, 2 Am. B. R. 224, 94 Fed. 108; *Johnson v. Wald*, 2 Am. B. R. 84, 93 Fed. 640; *In re Steininger*, 6 Am. B. R. 107 Fed. 669; *In re Hugill Mercantile*

Co., 3 Am. B. R. 686, 100 Fed. 616; *In re Kellogg*, 6 Am. B. R. 389; affirmed, 7 Am. B. R. 270, 112 Fed. 52; *In re Shepherd*, 6 Am. B. R. 725.

50. Compare *Tiffany v. Lucas*, 15 Wall. 410; *Sedgwick v. Wormser*, Fed. Cas. 12,626; *Curran v. Munger*, supra.

50a. *Matter of Farrell Co.*, 9 Am. B. R. 341, holding that where the provisions of the New York statute, L. 1902, chap. 528, entitled "An act to regulate the sale of merchandise in bulk," are willfully and deliberately ignored by an alleged bankrupt, upon such a sale made by him within the four months' period, the transfer is void under subsection e of the above section.

the title to property affected thereby vests in the trustee, yet a suit to recover will often be necessary. This is invariably so, where possession is not in the bankrupt. If in his possession, it may be reached summarily.<sup>51</sup> Not so where a third party is interested, save with his consent.<sup>52</sup> The trustee must then proceed by suit in the proper tribunal,<sup>53</sup> and show facts bringing the case within this subsection. What has been said as to suits to set aside voidable preferences is largely applicable here.<sup>54</sup>

*Amendment of 1903.*—The words added here are the same as those added to § 60-b and § 70-e. Clearly, they refer to any suit which may be brought under the subsection, and not merely to a suit based on a state law. The meaning and purpose of the amendment have already been discussed. The amendatory act has conferred concurrent jurisdiction upon district courts with state courts to set aside transfers made by a bankrupt within the four months' period, which are alleged to be null and void as to creditors by a state law.<sup>54a</sup> As to the effect of the omission from § 23-b, as amended, of any reference to § 70-e, as originally phrased in the Ray bill, *quære*.<sup>55</sup> For the time when the amendments became operative, see "Supplementary Section to Amendatory Act," *post*.

**Miscellaneous Invalid Transfers or Incumbrances.**—The books are already well filled with precedents. All turn on their own facts.<sup>56</sup> It is impossible to deduce hard and fast rules. The more important cases are classified in the succeeding paragraphs.

*Mortgages to Secure Antecedent Debts.*—These are void.<sup>57</sup> If part of the consideration is present and made in good faith, such a

51. See *In re Deuell*, 4 Am. B. R. 60, 100 Fed. 633; and many cases where the remedy of contempt has been resorted to.

52. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163.

53. See, generally, under Sections Two and Twenty-three.

54. See Section Sixty.

54a. *Johnson v. Forsyth Mercantile Co.*, 11 Am. B. R. 669, 127 Fed. 845. See *McNulty v. Feingold*, 12 Am. B. R. 338, holding that a trustee in bankruptcy may maintain a suit in equity in a district court, for an accounting of money collected by defendants on accounts fraudulently assigned to them by bankrupts, al-

though the face value of such accounts is known to the trustee. As to actions by trustees to set aside fraudulent conveyances, see *Schmitt v. Dahl*, 11 Am. B. R. 226 (Minn. Sup.); *Kohout v. Chaloupka*, 11 Am. B. R. 265 (Neb. Sup.).

55. This is considered in Section Twenty-three of this work.

56. For instance, *In re Little River Lumber Co.*, 1 Am. B. R. 483, 92 Fed. 585, and *In re Head*, 7 Am. B. R. 556, 114 Fed. 489. See also for decisions on this general subject, *Harvey v. Smith*, 7 Am. B. R. 497, and *In re Standard Laundry Co.*, 8 Am. B. R. 538, 116 Fed. 476.

57. *In re Ronk*, 7 Am. B. R. 31,

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## Chattel Mortgages.

mortgage will be good to that extent.<sup>58</sup> But where there is an entire absence of good faith, the fresh consideration does not save the mortgage; it is void even as to that.<sup>59</sup> Where the mortgagor remains in possession with power to sell in the usual course of business, but fails to comply with a provision in the mortgage that he shall make daily deposits of all sales to apply upon the debt secured, the legal effect of the mortgage is to hinder and delay creditors; and if given within the four months' period is null and void.<sup>59a</sup> Although the mortgage is given to secure a present loan, if the money borrowed is to be used in part payment of antecedent debts, the mortgage has been held to be void.<sup>59b</sup>

*Chattel Mortgages.*—Here the cases are quite numerous and in each instance turn upon the requirements of the state law.<sup>60</sup> Cases where the validity of conditional sales has been attacked are also stated here.<sup>61</sup> So also where a pledge of collateral has been called in question.<sup>62</sup>

111 Fed. 154; *Pollock v. Jones*, 10 Am. B. R. 616, 124 Fed. 163 (affirming 9 Am. B. R. 262); *Farmers' Bank v. Carr & Co.*, 11 Am. B. R. 733, 127 Fed. 690. Compare *In re Wolf*, ante, and *Sabin v. Camp*, 3 Am. B. R. 578, 98 Fed. 974.

58. *In re Wolf*, ante; *City Nat. Bank v. Bruce*, 6 Am. B. R. 311, 109 Fed. 69, affirming *In re Alverson*, 5 Am. B. R. 855; *Stedman v. Bank of Monroe*, 9 Am. B. R. 4 (C. C. A.), 117 Fed. 237. Compare also *In re Davidson*, 5 Am. B. R. 528, 109 Fed. 882; *In re Durham*, 8 Am. B. R. 115, 114 Fed. 750. See also *In re Sawyer*, 12 Am. B. R. 269, 130 Fed. 384, where a chattel mortgage given in security for the payment of notes to a certain amount was sustained as to the amount actually loaned at the time the mortgage was executed.

59. *In re Hugill*, 3 Am. B. R. 686, 100 Fed. 616. See also a case somewhat analogous, *In re Barrett*, 6 Am. B. R. 48. Compare also *In re Soudans Mfg. Co.*, post.

59a. *Egan State Bank v. Rice*, 9 Am. B. R. 437, 119 Fed. 107.

59b. *In re Pease*, 12 Am. B. R. 66, 129 Fed. 446; *In re Butler*, 9 Am. B. R. 539, 120 Fed. 100; *In re Soudan*

*Mfg. Co.*, 8 Am. B. R. 45, 113 Fed. 804.

60. *In re Adams*, 2 Am. B. R. 415; *In re Leigh*, ante; *Stroud v. McDaniel*, 5 Am. B. R. 695, 106 Fed. 493; *In re Shirley*, ante; *In re Platts*, 6 Am. B. R. 568, 110 Fed. 126; *In re Ronk*, supra; *In re Pekin Plow Co.*, 7 Am. B. R. 369, 112 Fed. 308; *In re Soudans Mfg. Co.*, 8 Am. B. R. 45; 113 Fed. 804. As to binding effect of state law and decisions compare *In re Hull*, 8 Am. B. R. 302, 115 Fed. 858, with *In re Josephson*, 8 Am. B. R. 423, 111 Fed. 404; the latter case is thought the more reliable.

61. *In re Klingaman*, 4 Am. B. R. 254, 101 Fed. 691; *In re Howland*, 6 Am. B. R. 495, 109 Fed. 869; *In re Tatem*, 6 Am. B. R. 426, 110 Fed. 519; *In re Sewell*, 7 Am. B. R. 133, 111 Fed. 791; *In re Garcewich*, 8 Am. B. R. 149, 115 Fed. 87.

62. *Chattanooga Nat. Bank v. Rome Iron Co.*, 4 Am. B. R. 441, 102 Fed. 755; *In re Cobb*, 3 Am. B. R. 129, 96 Fed. 821; *Casey v. Cavaroc*, 96 U. S. 467; *Clark v. Iselin*, 21 Wall. 360; *Adams v. Nat. Bank*, 2 Fed. 174; *Davis v. R. R. Co.*, Fed. Cas. 3,648; *In re Grinnell*, Fed. Cas. 5,829.

*Voluntary Settlements.*—These are avoided in terms by the English law. We have no similar provision, but judicial construction has made our rule substantially the same. If made by an insolvent husband to his wife they are held void.<sup>63</sup> No matter how devious the method, if the wife gets the property from an insolvent husband without consideration, intent will be presumed and the transfer set aside.<sup>64</sup> Similarly, transfers to other relations are suspicious and require strict proof.<sup>65</sup>

*General Assignments.*—Voluntary general assignments, whether with or without preferences, are legal frauds, and therefore voidable. The cases are already numerous,<sup>66</sup> and establish a doctrine not always recognized under the former laws. The legal effect of a general assignment is considered elsewhere.<sup>67</sup>

**Practice.**—If the property may be recovered summarily, a petition, duly verified, will usually be enough to secure the order to show cause. It should show facts bringing it within the terms of some of the subsections of this section.<sup>67a</sup> If the bankrupt or his agent who is in possession refuses to deliver the property, contempt proceedings may be brought. In cases where a suit is necessary, it must be for either the property or its value, and in accordance with the rules and practice of the court where brought. The trustees should not, however, bring such a suit without obtaining a direction to that effect by the referee in charge.<sup>68</sup>

<sup>63.</sup> In re Skinner, 3 Am. B. R. 5,486; Boese v. King, 108 U. S. 163, 97 Fed. 190; In re Grahs, ante; 379.  
<sup>64.</sup> Kehr v. Smith, 20 Wall. 31; Sedgwick v. Place, supra; Pratt v. Curtis, Fed. Cas. 11,375; Antrim v. Kelly, Fed. Cas. 494.

<sup>65.</sup> In re Smith, 3 Am. B. R. 95, 100 Fed. 795; In re Eldred, Fed. Cas. 4,328.

<sup>66.</sup> In re Johann, Fed. Cas. 7,331. Compare Adams v. Collier, 122 U. S. 382.

<sup>67.</sup> West Co. v. Lea, 174 U. S. 590, 2 Am. B. R. 463; Davis v. Bohle, 1 Am. B. R. 412, 92 Fed. 325, affirming In re Sievers, 1 Am. B. R. 117, 91 Fed. 366; In re Gutwillig, 1 Am. B. R. 78, 90 Fed. 475; affirmed, s. c., 1 Am. B. R. 388, 92 Fed. 327; In re Gray, 3 Am. B. R. 647; Globe Ins. Co. v. Cleveland Ins. Co., Fed. Cas.

<sup>67a.</sup> See under Sections Three and Twenty-three.

<sup>67a.</sup> For instance, in the case of McNulty v. Wiesen, 12 Am. B. R. 341, it was held that an allegation in an answer that the purchase of book accounts was made without intent on the part of the defendants to delay, hinder, and defraud the bankrupt's creditors, or any of them, is not impertinent, for the reason that under subsection e the defendants are required to show that they were purchasers in good faith and for a present fair consideration. See also Johnston v. Forsyth Mercantile Co., 11 Am. B. R. 669, 127 Fed. 845.

<sup>68.</sup> See also generally under Sections Two, Twenty-three and Sixty.

## VI. Subs. c, f. LIENS THROUGH LEGAL PROCEEDINGS.

**Comparative Legislation.**—The wide gulf between the former and the present law here needs little comment. Then, as has been said, only attachment liens were dissolved. Now all liens through legal proceedings share the same fate. Thus, the subsections under discussion are in harmony with the so-called “passive” act of bankruptcy<sup>69</sup> and, with it, establish a new class of constructive frauds resulting from what we have been wont to think justifiable foresight. This is the high-water mark of bankruptcy jurisprudence both in England and the United States. The change is so marked that the constitutionality of the clause has been attacked, though unsuccessfully.<sup>70</sup>

**Confusion Concerning Subs. c and Subs. f.**—A question much discussed early in the administration of the law was whether subsection f applied to voluntary bankruptcies. Some cases held that it did not.<sup>71</sup> The great weight of authority, however, is that both subsections may refer to either voluntary or involuntary cases.<sup>72</sup> The courts were at first also much confused by two subsections with apparently the same purpose, yet, while inconsistent in part, at the same time overlapping. This confusion is not now important. Subsection f seems to cover in general terms almost every lien specifically declared voidable in subsection c, as well as many more. Besides, it occurs later in the law and, having been inserted while the bill was in conference committee of the two Houses of Congress, thus represents, as it were, the last word of

69. § 3-a (3).

70. *In re Rhoads*, 3 Am. B. R. 380, 98 Fed. 399.

71. *In re De Lue*, 1 Am. B. R. 387, 91 Fed. 510; *In re Easley*, 1 Am. B. R. 715, 93 Fed. 419; *In re O'Connor*, 95 Fed. 943; *In re Collins*, 2 Am. B. R. 1.

72. *In re Friedman*, 1 Am. B. R. 510; *Peck, etc., Co. v. Mitchell*, 95 Fed. 258; *In re Richards*, 2 Am. B. R. 518, 95 Fed. 258; *In re Fellerath*, 2 Am. B. R. 40, 95 Fed. 121; *In re Rhoads*, 3 Am. B. R. 380, 98 Fed. 399; *In re Dobson*, 3 Am. B. R. 420, 98 Fed. 86; *In re Lesser*, 3 Am. B. R.

815, 100 Fed. 433; *In re Kemp*, 4 Am. B. R. 242, 101 Fed. 689; *Brown v. Case*, 6 Am. B. R. 744, 61 N. E. 279; *In re Benedict*, 8 Am. B. R. 463; *Mohr v. Mattox*, 12 Am. B. R. 330; *McKenney v. Cheney*, 11 Am. B. R. 54 (Ga. Sup.), in which case the court expressly dissented from the holding of Judge Thomas in the case of *In re O'Connor*, 95 Fed. 943, and held that a proper construction of subsection f requires the holding that it is applicable to both cases of voluntary and involuntary bankruptcy; *Mencke v. Rosenberg*, 9 Am. B. R. 323, 202 Pa. St. 131.

the framers of the statute.<sup>73</sup> It, therefore, is now usually relied on; subsection c is important only in those rare instances where subsection f does not apply.

*When Subs. c Applies.*—The element of insolvency at the time of the lien not always being essential under subsection c, as under subsection f, cases where this matter is in doubt will often, if possible, be brought within the former. This distinction is not important where the facts bring the alleged lien within subdivisions c (1) or c (2). Still, liens may be obtained through legal proceedings which amount to a fraud on the act irrespective of insolvency. In that event, while such cases will be rare, subsection c, and not its companion, applies. The distinction between "void" and "voidable," in the respective subsections, is not important. Several of the clauses making up subsection c have been considered elsewhere.<sup>74</sup> The phrase "in fraud of the provisions of the act" comes from the law of 1867.<sup>75</sup> It means, in brief, any act intended to disturb or resulting in a disturbance of that equilibrium between creditors of the same class which is the basic principle of all bankruptcy laws. Illustrative cases under the former law will be found in the foot-note.<sup>76</sup> The concluding clause of subsection c is doubtless expressive of the law. It extends to liens through legal proceedings<sup>77</sup> the rule of subrogation stated in subsection b. The fact that to be voidable under subsection c a lien must arise in a proceeding begun within the four months' period, should also be noted.

**Insolvency Essential.**—Here the distinction between liens through legal proceedings and other liens has already been pointed out. None of the former are dissolved by bankruptcy unless the lienee was insolvent at the time.<sup>78</sup>

**"Four Months Prior to the Filing of the Petition."**—Liens through legal proceedings acquired more than four months before the bank-

73. See *In re Tune*, 8 Am. B. R. 285, 115 Fed. 906.

74. For instance, "Within four months prior to filing the petition;" "Reasonable cause to believe that the defendant was insolvent;" "In contemplation of bankruptcy;" "Obtained or permitted;" and "Insolvency."

75. § 35, R. S., § 5128.

76. *Wager v. Hall*, 16 Wall. 584; *Buchanan v. Smith*, 16 Wall. 277; *Toof v. Martin*, 13 Wall. 40.

77. *In re Moore*, 6 Am. B. R. 175, 107 Fed. 234; *In re Higgins*, 3 Am. B. R. 364, 97 Fed. 775.

78. *Simpson v. Van Etten*, 6 Am. B. R. 204, 108 Fed. 199. For definition of "insolvent," see § 1 (15).



## Subs. c, f.] Miscellaneous Invalid Liens through Legal Proceedings.

ruptcy are not affected.<sup>79</sup> When the question is one of hours, only whole days are counted.<sup>80</sup> But it is the accrual of the lien, not the entry of a judgment not amounting to a lien, from which the time runs.<sup>81</sup> The effect of the words quoted where the lien is inchoate before the four months' period and does not become fixed until followed by a judgment within the period is considered, *post*.

**Miscellaneous Invalid Liens through Legal Proceedings.**—The more important class of liens of this character is considered in the succeeding paragraphs.

*By Judgment and Execution.*—An important distinction must be noted here. A mere judgment is often not a lien. Until it becomes such, as by issue of execution or docketing in a register's office, it is not affected by this subsection,<sup>82</sup> and this in spite of the use of the word "judgment" in the first clause.<sup>84</sup> The law of each state determines when a judgment becomes a lien.<sup>85</sup> Under the former law, judgments, even when followed by execution and levy, were not affected by bankruptcy.<sup>86</sup> Now, if in fact liens and the element of insolvency appears, such judgment-liens are annulled by bankruptcy if the petition is filed within four months.<sup>87</sup> But this is not so where the money collected has already been paid to the judgment creditor.<sup>88</sup> The term "all levies" is comprehensive enough to include a seizure of the property of an insolvent under replevin process.<sup>88a</sup> A judgment or decree enforcing a pre-existing lien is

79. In re Blumberg, 1 Am. B. R. 633, 94 Fed. 476.

80. Jones v. Stevens, 5 Am. B. R. 571, 48 Atl. 170. See also under Section Thirty-one.

81. Compare Palmenter Mfg. Co. v. Stoeber, 3 Am. B. R. 220, 97 Fed. 330. See also Metcalf v. Barker, 187 U. S. 165, 9 Am. B. R. 36.

82. For liens growing out of garnishment proceedings, see In re McCartney, 6 Am. B. R. 367, 109 Fed. 621; In re Beals, 8 Am. B. R. 639, 116 Fed. 530.

83. In re Kenney, 5 Am. B. R. 355, 105 Fed. 897; Levor v. Seiter, 5 Am. B. R. 576. Compare In re Kavanaugh, 3 Am. B. R. 832, 99 Fed. 928; Doyle v. Heath, 4 Am. B. R. 705; In re Darwin, 8 Am. B. R. 703.

84. In re Pease, 4 Am. B. R. 547; In re Beaver Coal Co., 6 Am. B. R. 404, 110 Fed. 630; affirmed, s. c., 7

Am. B. R. 542, 113 Fed. 889; In re Engle, ante; In re Lesser, 5 Am. B. R. 320; s. c., in Supreme Court, 187 U. S. 165, 9 Am. B. R. 36. Contra, St. Cyr. v. Daignault, 4 Am. B. R. 638, 103 Fed. 854. Compare also Mauran v. Crown Carpet Lining Co., 6 Am. B. R. 734.

85. In re Blair, 6 Am. B. R. 206, 108 Fed. 529; In re Darwin, supra.

86. In re Gold, etc., Co., Fed. Cas. 5515; In re Winn, Fed. Cas. 17,876.

87. Compare In re Richards, ante. See also In re Storm, 4 Am. B. R. 601, 103 Fed. 618; In re Stout, 6 Am. B. R. 505, 109 Fed. 794; In re Benedict, 8 Am. B. R. 463.

88. Levor v. Seiter, 8 Am. B. R. 459, modifying s. c., 5 Am. B. R. 576.

88a. In re Hymes, etc., Co., 12 Am. B. R. 477, 130 Fed. 977; In re Haynes, 10 Am. B. R. 715, 123 Fed. 1001;

not necessarily within the prohibition of subsection f, since such subsection is confined to judgments which themselves create liens.<sup>88b</sup> But if a judgment is rendered upon an unsecured claim within the four months' period it becomes null and void under such subsection upon the debtor being adjudicated a bankrupt, in which case the invalidity of the judgment relates back to the time the judgment was rendered, and nullifies such judgment and all subsequent proceedings thereon.<sup>88c</sup>

*By Attachment.*—Here the cases under the former law are quite generally applicable.<sup>89</sup> An attachment lien is within the terms of subsection c as well as subsection f.<sup>90</sup> Even if the judgment antedates the law, and the attachment is within the four months' period, it is dissolved.<sup>91</sup> It has been held that where the lien is by attachment on *mesne* process made before such four months' period and followed by a judgment and levy within it, the attachment is not dissolved by subsection f.<sup>92</sup> Prior to *Metcalf v. Barker*,<sup>93</sup> the weight of authority was to the contrary; indeed, it was thought that attachments so made were in the same category as those actually within four months of bankruptcy.<sup>94</sup> However, while *Metcalf v. Barker* is not exactly in point, its conclusion seems to apply to all cases in-

Matter of Weinger, 11 Am. B. R. 424, 126 Fed. 875.

<sup>88b.</sup> *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36; *Hiller v. Leroy*, 12 Am. B. R. 733, 179 N. Y. 369, in which case the judgment had been recovered and docketed more than four months prior to the filing of a petition in bankruptcy by the judgment debtors, and it was held that the lien thus impressed upon the real estate of the debtors could be enforced within such period either by a sale of the land under execution or by an action in equity to obtain a decree adjudging transfers made by the judgment debtors to have been void. Compare *Mencke v. Rosenberg*, 9 Am. B. R. 323, 202 Pa. St. 131, in which case it was held that under the Pennsylvania statute, if a testatum *fi. fa.* is issued within the period of four months prior to the filing of the petition, a lien is created which is invalidated by subsection f.

<sup>88c.</sup> *Clark v. Larremore*, 188 U. S. 486, 9 Am. B. R. 476; *Mohr v. Mat-*

*tox*, 12 Am. B. R. 330 (Ga. Sup.); *McKenney v. Cheney*, 11 Am. B. R. 54 (Ga. Sup.); *Kinmouth v. Braeutigan*, 10 Am. B. R. 83 (N. J. Eq.), 52 Atl. 226; *In re Breslauer*, 10 Am. B. R. 33, 121 Fed. 910.

<sup>89.</sup> See American Digest, Century ed., "Bankruptcy," §§ 296-305.

<sup>90.</sup> *In re Higgins*, ante; *In re Kemp*, 4 Am. B. R. 242, 101 Fed. 689; *Wood v. Carr*, 10 Am. B. R. 577 (Ky. Ct. App.).

<sup>91.</sup> *Peck Lumber Co. v. Mitchell*, ante. *Contra*, *In re De Lue*, ante.

<sup>92.</sup> *In re Blair*, 6 Am. B. R. 206, 108 Fed. 529; *Pepperdine v. Bank of Seymour*, 10 Am. B. R. 570 (Mo. App.).

<sup>93.</sup> 187 U. S. 165, 9 Am. B. R. 36.

<sup>94.</sup> *In re Lesser*, 5 Am. B. R. 326; *In re Johnson*, 6 Am. B. R. 202, 108 Fed. 373. Compare also *In re Lesser*, 3 Am. B. R. 815, 100 Fed. 433; affirmed, 5 Am. B. R. 320; and both reversed in *Metcalf v. Barker*, supra.

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volving inchoate liens ante-dating the four months' period, so that where a valid attachment is obtained more than four months prior to the commencement of the bankruptcy proceedings, the attachment creditor should be permitted to prosecute the action to judgment and satisfy the same by an execution sale.<sup>94a</sup> Other cases, more or less affected by this decision, are referred to in the footnote.<sup>95</sup>

*By Creditor's Bill.*—Until January, 1903, a clash of authority similar to that just noted existed here. It was well settled that the beginning of a creditor's suit to reach equitable assets gave such a creditor at least an inchoate lien; and the authorities were quite equally divided as to whether, when the suit ante-dated the four months' period, such a lien was dissolved.<sup>96</sup> *Metcalf v. Barker, supra*, has settled the question. If the creditor's suit was begun before the period, no matter if the judgment was entered within it, the lien is not affected by § 67-f and the bankruptcy court has no power to enjoin further proceedings in such suit.

**Practice on Suits to Annul Liens.**—The distinction here between subsection f and subsection c is not important. Though the former makes the liens it condemns void, and declares that "the lien shall be deemed wholly discharged," when the lien has resulted in possession adverse to the trustee, a suit is usually necessary; though application for possession addressed to the state court will sometimes be enough.<sup>97</sup> The forum for such suits has already been considered.<sup>98</sup> The amendments of 1903 make it optional with the trustee to sue in the federal district court or in the state court. The practice depends on the law and rules applicable to the court in which the suit is brought. Before beginning such a suit, the trustee customarily applies to the referee for permission.

<sup>94a</sup>. In re Snell, 11 Am. B. R. 35, 125 Fed. 154.

<sup>95</sup>. *Botts v. Hammond*, 3 Am. B. R. 775, 99 Fed. 916; *In re Burlington Malting Co.*, 6 Am. B. R. 369, 109 Fed. 777; *In re Schenkein*, 7 Am. B. R. 162, 113 Fed. 421; *Watschke v. Thompson*, 7 Am. B. R. 504; *Powers Dry Goods Co. v. Nelson*, 7 Am. B. R. 506; *Schmilovitz v. Bernstein*, 47 Atl. 884.

<sup>96</sup>. Thus, compare *In re Lesser*, 3 Am. B. R. 815, 100 Fed. 433; affirmed, 5 Am. B. R. 320, and reversed in *Metcalf v. Barker, supra*, and *In re Adams*, 1 Am. B. R. 94, with *Taylor v. Taylor*, 3 Am. B. R. 211, and *Doyle v. Heath, ante*.

<sup>97</sup>. Thus see *Hardt v. Schuylkill, etc., Co.*, 8 Am. B. R. 479.

<sup>98</sup>. In Section Twenty-three.

**Preserving Liens.**— Here the statute is sufficiently explicit. If the creditor has a void or voidable lien, the court may order it preserved for the benefit of the estate. Thus, in those States where the filing of a creditor's bill does not create a lien that survives the bankruptcy, the court may order the trustee to intervene and ask to be substituted as plaintiff. Likewise, "the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

**Saving Clause.**— The proviso at the end of subsection f corresponds to subsection d, which has reference to liens other than through legal proceedings, as well as to a clause in the body of subsection e, saving *bona fide* transactions from the penalties attending fraudulent transfers. It is also expressive of the law, and was seemingly inserted for reasons of caution only. That neither the plaintiff in nor the sheriff holding under a void attachment is a *bona fide* purchaser for value has already been held.<sup>99</sup>

<sup>99</sup>. In re Kaupisch Creamery Co., v. Stevens, ante. Compare also foot-  
5 Am. B. R. 790, 107 Fed. 93; Jones note 12.

## SECTION SIXTY-EIGHT.

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### SET-OFFS AND COUNTERCLAIMS.

§ 68. **Set-offs and Counterclaims.**— *a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

*b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

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**Analogous provisions:** In U. S.: Act of 1867, § 20, R. S., § 5073; Act of 1841, § 5; Act of 1800, § 42.

In Eng.: Act of 1883, § 38.

**Cross references:** To the law: §§ 5-g; 16; 57-i; 60-c.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Subs. a. Set-Offs in Bankruptcy.

Comparative Legislation.

Cross-References.

**"Mutual Debts or Mutual Credits."**

*As to Time.*

*As to Nature of Liability.*

*As to Being in the Same Right.*

*As to Joint and Several Claims.*

*Waiver of Set-off.*

**II. Subs. b. When not Allowed.**

Subd. (1). Not Provable Against the Estate.

Subd. (2). Purchased After Bankruptcy or Within Four Months Before.

*"With a View to Such Use and with Knowledge," etc.*

Miscellaneous Cases.

**I. Subs. a. SET-OFFS IN BANKRUPTCY.**

**Comparative Legislation.**—All bankruptcy laws contain clauses similar to these. They are doubtless merely expressive of recognized principles.<sup>1</sup> The English rule differs from ours only in stopping the set-off at the moment of notice of the commission of an act of bankruptcy.<sup>2</sup> Our law of 1800 went no further than does subsection a of the present statute—declaring the principle and leaving the exceptions to the courts.<sup>3</sup> So also of that of 1841.<sup>4</sup> The original act of 1867<sup>5</sup> was identical with that now in force, save that it did not refuse allowance to set-offs growing out of debts or credits "with a view \* \* \* and with knowledge" within the four months' period; the genesis of the words just quoted, which are found in the law of 1898, appears in the amendment of 1874, which, however, was applicable only to involuntary cases.<sup>6</sup> Considered historically, the purpose and development of the section are clear. In their application to given sets of facts, however, the law of set-off as applied to bankruptcy is somewhat hazy, and precedents are not always reliable.

**Cross-References.**—The most important is § 60-c. Indeed, the courts have had little to do with set-offs under the act of 1898, save collaterally to the animated controversy over the surrender of so-called innocent preferences.<sup>7</sup>

**"Mutual Debts or Mutual Credits."**—These words or equivalents are found in the set-off clauses in all bankruptcy laws. Indeed, the words, "mutual credits" seem to be peculiar to such laws.<sup>8</sup> High authority has declared that "mutual credits" are something differ-

1. *Sawyer v. Hoag*, 17 Wall. 610.

2. Act of 1883, § 38.

3. Act of 1800, § 42.

4. Act of 1841, § 5.

5. Act of 1867, § 20.

6. R. S., § 5073.

7. See under Section Sixty (subs. c), and the cases there cited.

8. *In re Catlin*, Fed. Cas. 2,519; *In re Dow*, Ex parte Whiting, Fed. Cas. 17,573. Compare also *Libby v. Hopkins*, 104 U. S. 303.

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"Mutual Debts or Mutual Credits."

ent from "mutual debts."<sup>9</sup> To the lay mind, the distinction is one without a difference, for a mutual credit, as, for instance, the delivery of collateral to collect and apply, in the end becomes a debt and is set off as such.<sup>10</sup> Indeed, in effect, at least under the present law, there can be practically no difference. In ultimate analysis a mutual credit is not unlike an unliquidated debt, and such debts are now provable.<sup>11</sup> There are, however, some exceptions to the rule of mutual credits. Thus, if the credit will not terminate in a debt,<sup>12</sup> or if a creditor intrusted by his debtor with goods has not the right to sell them until after the bankruptcy,<sup>13</sup> or if such goods are delivered to the creditor for a specific purpose,<sup>14</sup> a mutual credit does not arise, and there can be no set-off. These distinctions are, however, not important. The claim to set-off is usually made on mutual debts, the creditor owing the bankrupt a sum of money and the bankrupt, and, therefore, his estate, being liable to the creditor for a larger sum. In such a case, a balance is struck and the claim is allowed for the balance, provided the facts do not fall within subsection b. But mere payments on account before bankruptcy are not mutual debts or credits within the meaning of this section.<sup>15</sup> Preferences voidable under subsections a and b of section 60 are not allowable as set-offs against claims of the preferred creditors, on the ground that the preferences and the claims constitute mutual debts and credits.<sup>15a</sup>

*As to Time.*—Strictly, the time when the right to set-off is determined is the time the petition is filed. But it makes no difference whether the debts are payable *in futuro* or *in presenti*.<sup>16</sup> "Debt" means any debt, demand, or claim provable in bankruptcy.<sup>17</sup> Thus, unliquidated claims may be set off against liquidated,<sup>18</sup> and, it is thought, under the present law, even liabilities sounding in tort

9. *Rose v. Hart*, 8 Taunt. 499; s. c., in *Smith Leading Cases*, Vol. 2, p. 330.

10. In *re Dow*, ante; *Myers v. Davis*, 22 N. Y. 489; *Aldrich v. Campbell*, 70 Mass. 284; *Medomak Bank v. Curtis*, 24 Me. 36.

11. See § 63-b.

12. *Rose v. Hart*, supra; *Groom v. West*, 8 Ad. & E. 758.

13. In *re Dow*, supra.

14. *Libby v. Hopkins*, ante; *Alsager v. Currie*, 12 Mees. & W. 751.

15. In *re Ryan*, 5 Am. B. R. 396, 105 Fed. 760.

15a. *Western Tie & Timber Co. v. Brown*, 12 Am. B. R. 111 (C. C. A.), 129 Fed. 728.

16. In *re City Bank*, Fed. Cas. 2,742; *Drake v. Rollo*, Fed. Cas. 4,066; *Collins v. Jones*, 10 B. & C. 777.

17. § 1 (11).

18. Compare *Bell v. Carey*, 8 C. B. 887, and even under the narrower doctrine of the English law, *Jack v. Kipping*, 9 Q. B. D. 113. See also, generally, under Section Sixty-nine, ante.

against those purely *ex contractu*. But this doctrine as to time is subject to the exception stated in subsection b (2), considered *post*; a further exception in cases of mutual credits has already been noted.

*As to Nature of Liability.*—It is not necessary that the debts or credits be of the same character. Thus the mutual debts need not arise out of the same transaction,<sup>19</sup> or be for money owed the one to the other. The basic test is mutuality, not similarity, of obligation. Illustrative cases under the former law are cited in the footnote.<sup>20</sup> A question somewhat discussed is the right of a bank to set off its deposit debt against the unpaid note of a bankrupt depositor. This right has been denied in one case, because the book-keeping entries were not actually made before the bankruptcy, and the set-off, therefore, amounted to a preference.<sup>21</sup> But every set-off is, in a sense, a preference, and the ancient rule permitting a banker so to charge deposit against note is undoubtedly the rule under the present, as under the former law.<sup>22</sup> As stated by the United States Supreme Court: "The money deposited in a bank becomes a part of its general funds, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have the deposit repaid in whole or in part by honoring the depositor's checks drawn thereon. Such deposit creates an ordinary debt, not a privilege or right of a fiduciary character. The amount of such a deposit may, therefore, be set off in bankruptcy against a claim against the depositor, allowing the bank to prove for the balance."<sup>22a</sup>

*As to Being in the Same Right.*—This is essential. Thus, a debt due one as an executor cannot be set off against a debt due from him individually;<sup>23</sup> a creditor of a corporation cannot set off his liability for unpaid subscriptions for its stock,<sup>24</sup> and, where the ownership of the claim is merely nominal, it cannot be set off against

19. *In re Christensen*, 4 Am. B. R. 99, 101 Fed. 802. Consult also *In re Brewster*, 7 Am. B. R. 486.

20. *In re Petrie*, Fed. Cas. 11,040; *Ex parte Howard Nat. Bank*, Fed. Cas. 6,764; *Ex parte Pollard*, Fed. Cas. 11,252.

21. *In re Tacoma, etc., Co.*, 3 N. B. N. Rep. 9.

22. *In re Little*, 6 Am. B. R. 681, 110 Fed. 621; *In re Kalter*, 2 N. B. N. Rep. 264. Compare also *In re*

*Myer*, 5 Am. B. R. 596; *Traders' Bank v. Campbell*, 14 Wall. 87.

22a. *New York County National Bank v. Massey*, 192 U. S. 138, 11 Am. B. R. 42, reversing 8 Am. B. R. 515. See also *Matter of Levi*, 9 Am. B. R. 176, 121 Fed. 198; *Matter of Semmer Glass Co.*, 11 Am. B. R. 665.

23. *Bishop v. Church*, 3 Atk. 691.

24. *In re Goodman Shoe Co.*, 3 Am. B. R. 200, 96 Fed. 949; *Sawyer v. Hoag*, ante; *Jenkins v. Armour*, Fed. Cas. 7,260.



Subs. b.]

When Not Allowed.

a debt due from such owner.<sup>25</sup> But the trustee in bankruptcy may set off claims which have vested in him, even though they never vested in the bankrupt.<sup>26</sup> A surety who, by paying the principal's debt, has become subrogated to the latter's rights may, of course, avail himself of a set-off in favor of the principal;<sup>27</sup> such debts are then in the same right.

*As to Joint and Several Claims.*—Here the general rule is that a joint claim, as that of a partnership, cannot be set off against the debt of one of the individuals jointly claiming.<sup>28</sup> The reason for this is that the individual partner should not, in justice to his associates, be permitted to pay his debts out of partnership property. Conversely, however, when the partnership is the debtor, their liability being *in solido*, a debtor of one of them may set off his indebtedness against such joint debt to him.<sup>29</sup> A further exception is stated in a case,<sup>30</sup> where the joint credit was given on account of a separate debt, this being strictly an instance of "mutual dealing."<sup>31</sup>

*Waiver of Set-off.*—If a creditor proves his debt, without claiming set-off, he will generally be deemed to have waived it.<sup>32</sup> At the same time, inadvertence or mistake is usually a sufficient excuse for leave to withdraw and amend. There are no cases under the present law yet reported.<sup>33</sup>

## II. Subs. b. WHEN NOT ALLOWED.

**Subd. (1). Not Provable Against the Estate.**—There is a difference between the former and the present law here, which has given rise to some speculation.<sup>34</sup> Formerly, to entitle to set-off, a debt must have been "provable in its nature;" now, it must be "provable." Under the law of 1867, it was held that a debtor of the estate holding a claim on which he had attempted to secure a preference might still use it as a set-off, because it was provable in its nature.<sup>35</sup> The

25. In *re Lane*, Fed. Cas. 8,043. Compare *Boyd v. Mangles*, 16 Mees. & W. 336.

26. In *re Crystal, etc., Co.*, 4 Am. B. R. 55, 104 Fed. 265.

27. Compare §§ 16 and 57-i. See also In *re Bingham*, 2 Am. B. R. 223, 94 Fed. 796; also *Morgan v. Wordell*, post.

28. *Gray v. Rollo*, 18 Wall. 629; *Ex parte Twogood*, 11 Ves. 516; *Ex parte Caldicott*, 25 Ch. D. 716.

29. *Tucker v. Oxley*, 5 Cranch, 34.

30. In *re Crystal, etc., Co.*, ante.

31. These words occur in the English section on set-off.

32. *Russell v. Owen*, 61 Mo. 185.

33. Cases under the law of 1867 are: *Hunt v. Holmes*, Fed. Cas. 6,890; *Brown v. Farmers' Bank*, 6 Bush (Ky.), 198; *Standard Oil Co. v. Hawins*, 74 Fed. 395.

34. See In *re Dillon*, 4 Am. B. R. 63, 100 Fed. 627.

35. *Clark v. Iselin*, 21 Wall. 360.

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 Purchased After Bankruptcy or Within Four Months Before. [§ 68.
 

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distinction seems rather tenuous. Thus, under the present law, which denies allowance to claims whose owners have been preferred, the word "provable" was held to mean the same as "provable in its nature" and, the case being one of mutual credit, the set-off was allowed, in spite of a preference making it technically not provable.<sup>36</sup> Subject, however, to exceptions based on equitable principles like those applied in *Morgan v. Wardell*, *supra*, the general rule is that no claims tainted with a preference may be asserted by way of set-off, except those within the terms of § 60-e. The latter is new. It has already been discussed.<sup>37</sup>

**Subd. (2). Purchased After Bankruptcy or Within Four Months Before.**—This clause differs from that in the law of 1867 only in denying set-off to claims purchased within the four months' period; this that law did not do. The necessity of the rule is apparent. The doctrine of set-off would foster preferences of the worst kind, if a well-informed debtor of an insolvent could buy up claims against him either within four months of the bankruptcy or after the filing of the petition.

"*With a View to Such Use and with Knowledge*," etc.—The words here were not in the original law of 1867.<sup>38</sup> The idea expressed by the words "with a view to such use" was incorporated by the amendatory act of 1874, but only as to involuntary cases; the words "with knowledge or notice," etc., to the end of the subsection, are new. The use of the conjunction "and" should be noted; those opposing a claim to set-off on the ground specified in subdivision (2) must show, not only its purchase within the time specified, but that such purchase was with a view to its use as a set-off *and* with knowledge or notice that the bankrupt was insolvent, *or* had committed an act of bankruptcy. Such proof will not be difficult if the purchase antedates the bankruptcy; it may, if within the four months' period.

**Miscellaneous Cases.**—There are none under the present law. Those under the former should be read with the date of the amendatory act of 1874 carefully in mind.<sup>39</sup>

36. *Morgan v. Wordell*, 6 Am. B. R. 167. Compare *In re Kingsley*, Fed. Cas. 7,819.

37. See under Section Sixty of this work.

38. *In re City Bank*, Fed. Cas. 2,742. Compare *Hitchcock v. Rollo*, Fed. Cas. 6,535.

39. *Hovey v. Insurance Co.*, Fed. Cas. 6,743; *Hunt v. Holmes*, Fed. Cas. 6,890; *In re Perkins*, Fed. Cas. 10,982; *Bashore v. Rhoades*, 16 N. B. R. 72. Compare also *Smith v. Hill*, 8 Gray, 572; *Smith v. Brinkerhoff*, 6 N. Y. 305; also the numerous English cases on the same subject.

## SECTION SIXTY-NINE.

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### POSSESSION OF PROPERTY.

§ 69. **Possession of Property.**—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

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**Analogous provisions:** In U. S.: Act of 1867, § 40, R. S., § 5024.

In Eng.: Act of 1883, none.

**Cross references:** To the law: §§ 2 (3) (15); 3-e; 38-a (3).

To the General Orders: X, XIX.

To the Forms: Nos. 8, 9, 10.

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### SYNOPSIS OF SECTION.

#### **I. Seizure of Bankrupt's Property.**

Cross-References.

Scope of Section.

*The Bond.*

*Bonding the Property Back.*

Remedy Where Property is Claimed by a Third Person.

*The Marshal's Liability.*

Practice.

## I. SEIZURE OF BANKRUPT'S PROPERTY.

**Cross-References.**—The value of this section is not apparent; § 3-e, in connection with § 2 (3) and § 2 (15), is much broader.<sup>1</sup> It is difficult to conceive of a case within the terms of § 69 which is not also within those of the sections just mentioned. Further, a seizure under this provision can be authorized only by the judge, save in the contingency stated in § 38-a (3); while, under the earlier sections, property may be taken possession of by a receiver acting under the order of a referee. A similar practice was authorized by the law of 1867;<sup>2</sup> it included the arrest and detention of the debtor, but did not authorize the court to release the property to him on filing a new bond.

**Scope of Section.**—It divides itself naturally into three parts: (1) the authority to seize on a showing of specified facts, (2) a provision as to the bond to be given and its conditions and (3) a provision permitting the bankrupt to regain possession on filing a similar bond. A creditor desiring to seize property under this section must satisfy the judge that an alleged involuntary bankrupt either (1) has committed an act of bankruptcy, or (2) has so neglected or is so neglecting, or is about so to neglect his property that it has deteriorated or is deteriorating or will deteriorate. If so, on a specified bond being filed, the judge must issue the warrant to the marshal, but not to another; and the marshal must seize and hold the property subject to further orders. The application may be made only in involuntary cases, but not before the bankruptcy petition is filed or after the adjudication.<sup>3</sup> The remedy is, therefore, provisional. Its purpose is clearly to prevent deterioration or waste in the often long interval between the filing of an involuntary petition and an adjudication or dismissal.

**The Bond.**—The words here, unlike the section itself, are somewhat broader than those employed in § 3-e. It is thought that they mean substantially the same thing. "Damages" doubtless includes "costs" and "expenses." The discretion given the judge as to the sureties is no more than is allowed him by general statutes.<sup>4</sup>

1. See under Section Three, ante.

2. § 40, R. S., § 5024.

3. This follows from the words

"against whom an involuntary petition has been filed and is pending."

4. See under Section Three.

## § 69.]      Remedy Where Claimed by Third Person; Practice.

*Bonding the Property Back.*—This is equivalent to the reclaimer of a defendant in replevin. The judge has a like discretion as to the amount of the bond and the sureties. The condition of the bond is specified in the statute.<sup>5</sup>

**Remedy Where Property is Claimed by a Third Person.**—Manifestly, this section applies only to cases where the property is physically in the possession of the bankrupt or his agent.<sup>6</sup> The remedy is summary, as is that where a bankrupt, after adjudication, refuses to turn over property to his trustee.<sup>7</sup> But, where the property is held adversely, even if fraudulently, the usual remedy of a plenary suit must be resorted to.<sup>8</sup> This does not exclude the provisional remedy of injunction in cases where such a remedy is essential until an officer representing the court and the creditors can bring such suit.

*The Marshal's Liability.*—The marshal must decide what is, and what is not, the property of the bankrupt. If he seizes the property of another, he is liable to that other.<sup>9</sup> It is elementary that his warrant is not operative outside of his district.

**Practice.**—This remedy will rarely be resorted to. The requirement of a bond against damages will halt most petitioning creditors. Besides, there are the equivalent remedies of a receiver or an injunction, or the two combined.<sup>10</sup> When resort is had to it, the practice is simple. The application is made by motion based on affidavits, usually accompanying and perhaps referring to the involuntary petition, but always separate and distinct from such petition.<sup>11</sup> The affidavits should be positive in their averments, not mere statements of opinions or conclusions, and establish all the essential facts.<sup>12</sup> In short, they should amount to a proven

5. Compare *In re Harthill*, Fed. Cas. 6,161.

6. *In re Rockwood*, 1 Am. B. R. 272, 91 Fed. 363; *In re Kelly*, 1 Am. B. R. 306, 91 Fed. 504.

7. In such a case, a recusant bankrupt is, however, reached by contempt process.

8. See, generally, under Section Twenty-three. Note also the method of avoiding preferences and fraudulent transfers considered under Sections Sixty, Sixty-seven, and Seventy. All these remedies are really available only *after adjudication*.

Compare, for exceptional case, *In re Bender*, 5 Am. B. R. 632, 106 Fed. 873.

9. *In re Muller*, Fed. Cas. 9,912; *In re Marks*, Fed. Cas. 9,095; *Marsh v. Armstrong*, 20 Minn. 81. This doctrine is subject to exceptions: *In re Vogel*, Fed. Cas. 16,982; *In re Havens*, Fed. Cas. 6,230.

10. Compare *Blake v. Valentine*, 1 Am. B. R. 372, 89 Fed. 691. See also, generally, § 2 (3) (15) and § 11-a, ante.

11. *In re Kelly*, ante.

12. *Id.*

*prima facie* case. The form of the bond is suggested by Form No. 10, though the latter is intended for use by the alleged bankrupt in reclaiming the property. It is thought that affidavits for the justification of sureties should be added; this, that the court may be satisfied as to their responsibility without further inquiry. A surety company bond can be used. If the affidavits and bond are sufficient, the warrant issues in the form prescribed by Form No. 8. The procedure thereafter is the same as that on any seizure by a federal marshal. A warrant of seizure will not be issued under this section except upon a compliance with all the conditions prescribed therein; there can, therefore, be no waiver of the required affidavits and bond.<sup>12a</sup> The alleged bankrupt has two remedies: to move to vacate the warrant on the insufficiency of the affidavits or bond, or both, or to reclaim the property by filing a new bond. The latter method is more direct and is usually followed.<sup>13</sup>

<sup>12a</sup>. In re Sarsar, 9 Am. B. R. 576, 120 Fed. 40.

<sup>13</sup>. See Form No. 10.

## SECTION SEVENTY.

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### TITLE TO PROPERTY.

§ 70. **Title to Property.**— *a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

*b* All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

*c* The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

*d* Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

*e* The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.\**

*f* Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

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**Analogous provisions: In U. S.:** *As to property in general passing to the trustee*, Act of 1867, § 14, R. S., § 5044; Act of 1841, § 3; Act of 1800, §§ 10, 11, 17, 27, 50; *As to patents, copyrights, rights of action and the like*, Act of 1867, § 14, R. S., § 5046; Act of 1841, § 3; Act of 1800, §§ 13, 17; *As to sales by the trustee*, Act of 1867, §§ 15, 25, R. S., §§ 5062, 5062B, 5063, 5064, 5065, 5066; *As to sales of incumbered property*, Act of 1867, § 20, R. S., § 5075.

**In Eng.:** *As to property passing to the trustee*, Act of 1883, §§ 43, 44, 59; *As to burdensome property*, Act of 1883, § 55; Act of 1890, § 13; *As to sales by the trustee*, Act of 1883, §§ 56 (1), 70.

**Cross references: To the law:** §§ 1 (13); 2 (3) (7) (15); 3-e; 7 (4) (5); 12; 13; 14; 15; 47-a (2); 60-b; 67-e; 69.

**To the General Orders:** XVIII, XXVIII.

**To the Forms:** Nos. 13, 42, 43, 44, 45, 46.

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\*This sentence was added by the amendatory act of 1903.



## SYNOPSIS OF SECTION.

**I. Subs. a. Title to Property.****Comparative Legislation.****Scope of Section.****When Title Vests.**

*Bankrupt's Title Between Petition Filed and (1) Adjudication  
and (2) Appointment of Trustee.*

**What Vests.**

*Subject to all Claims, Liens, and Equities.*

**Subd. (1). Documents Relating to Bankrupt's Property.****Subd. (2). Patents, Copyrights, and Trade-Marks.****Subd. (3). Personal Powers.****Subd. (4). Property Fraudulently Transferred.**

*Effect of a General Assignment.*

**Subd. (5). Property Which Might Have Been Transferred or Levied Upon.**

*Remainders and Interests in Trust.*

*Dower and Curtesy Rights.*

*Licenses, Franchises, and Personal Privileges.*

*Life Insurance Policies.*

*Property Sold to the Bankrupt on Condition.*

*Property Affected by Fraudulent Representations.*

*Reclamation Proceedings.*

**Subd. (6). Rights of Action.****Burdensome Property.**

*Practice.*

**Exempt Property.**

*Conflict Between § 6 and § 70-a (5).*

**II. Subs. b. Appraisers and Appraisal.****In General.**

*Practice.*

**III. Subs. b. Sales of Property.****In General.**

*Illustrative Cases.*

**General Order XVIII.****Sales of Incumbered Property.****Practice on Sales.****IV. Subs. c. Transfer of Trustee's Title to Purchaser.****In General.****V. Subs. d. Title of Trustee Where Composition Is Set Aside or Discharge Revoked.****Cross-References.**

# VI. Subs. e. Transfers Fraudulent under State Laws May be Avoided by Trustee.

In General.

The Saving Clause.

The Amendment of 1903.

# VII. Subs. f. Title Reverts in Bankrupt on Confirmation of Composition.

In General.

## I. Subs. a. TITLE TO PROPERTY.

**Comparative Legislation.**—The analogous provisions of the English law are referred to in the Synopsis. The main differences are that title vests as of the date of the commission of the first act of bankruptcy,<sup>1</sup> and the property divisible among creditors includes not only what the debtor had at the commencement of the proceeding, but also what is acquired by or devolves on him before his discharge.<sup>2</sup> Each of our laws has had clauses regulating the vesting of title and indicating what vests.<sup>3</sup> That of 1867 is most nearly like the section under discussion.<sup>4</sup> Specific differences are considered in appropriate paragraphs, *post*. The differences between the old method of evidencing the vesting of title and that now the law have already been considered.<sup>5</sup>

**Scope of Section.**—This section is chiefly important (*a*) for its provisions fixing what property of a bankrupt vests in his trustee and the time when it vests, and (*b*) as adopting as a part of the bankruptcy system the respective state statutes providing a remedy against fraudulent transfers.<sup>6</sup> It also includes nearly all that is in the law relative to the method of selling a bankrupt's property. Besides, it provides for the appointment and reports of appraisers. The other subdivisions, c, d, and f, have to do either with minor matters of practice or else refer directly to and would have been more appropriately incorporated in sections previously discussed.<sup>7</sup>

1. Act of 1883, § 43.

2. Act of 1883, § 44.

3. See "Analogous Provisions" at head of Section.

4. For cases under that law, see *In re Rosenberg*, Fed. Cas. 12,055; *In re Wynne*, Fed. Cas. 18,117; *Markson v. Heaney*, Fed. Cas. 9,098.

5. See under Section Twenty-one, ante. Compare also law of 1841, where the decree itself divested the bankrupt's title.

6. Subs. e, *post*.

7. As to d, see §§ 13, 15; as to f, see § 12.

Subs. a.]

When Title Vests; What Vests.

**When Title Vests.**—Under the previous law, the trustee's title vested by relation as of the date of the commencement of the proceeding.<sup>8</sup> This cast doubt on the validity even of *bona fide* transactions between petition filed and adjudication; in short, made business by an alleged, but not yet adjudicated, bankrupt practically impossible. Under the act of 1841, there seems to have been a similar doubt.<sup>9</sup> The words "as of the date he was adjudicated a bankrupt" seem to have been inserted to meet these difficulties.<sup>10</sup> They are not antagonistic to the words found later in subdivision (5). The former refer to the time of vesting; the latter to what vests.<sup>11</sup> The remedy of the petitioning creditors, in case this freedom to trade is abused, is by the appointment of a receiver under § 2 (3) (15), or an appropriate proceeding under § 3-e or § 69.

*Bankrupt's Title Between Petition Filed and (1) Adjudication and (2) Appointment of Trustee.*—It follows that, under the present law, the title remains in the bankrupt at least to the date of adjudication; perhaps even to the date of the appointment of the trustee.<sup>12</sup> Prior to adjudication, fraud being absent, it may be transferred; but, being liable to be divested, no permanent lien can attach to it.<sup>13</sup> When, however, the trustee is appointed, his title goes back by relation to the date of the commencement of the proceeding.<sup>14</sup> Illustrative cases under the former law, which, however, for reasons above stated, should be read with caution, will be found in the foot-note.<sup>15</sup>

**What Vests.**—Here the present statute deals in particulars, where in the former general words were used.<sup>16</sup> It is not thought

8. See cases cited under foot-notes 4 and 15.

9. Compare *Ex parte Foster*, Fed. Cas. 4,960; *Ex parte Newhall*, Fed. Cas. 10,159; *In re Rust*, Fed. Cas. 12,171.

10. See House Report No. 1228, 54th Congress.

11. *In re Pease*, 4 Am. B. R. 578; *In re Barrow*, 3 Am. B. R. 414, 98 Fed. 582; *In re Burka*, 5 Am. B. R. 12, 104 Fed. 326; *In re Elmira Steel Co.*, 5 Am. B. R. 484, 109 Fed. 456. Compare *In re Harris*, 2 Am. B. R. 359, and *In re Mussey*, 3 Am. B. R. 592, 99 Fed. 71.

12. Though the better view is that, after adjudication, it is in custodia

legis. *Keegan v. King*, 3 Am. B. R. 79, 96 Fed. 758; *March v. Heaton*, Fed. Cas. 9,061; *In re Rosenberg*, ante.

13. *In re Engle*, 5 Am. B. R. 372, 105 Fed. 893. Compare *In re Corbett*, 5 Am. B. R. 224, 104 Fed. 872.

14. For this, see *In re Appel*, 4 Am. B. R. 722, 103 Fed. 931.

15. *Connor v. Long*, 104 U. S. 228; *Chapman v. Brewer*, 114 U. S. 158; *Howard v. Crompton*, Fed. Cas. 6,758; *Babbett v. Burgess*, Fed. Cas. 693; *Miller v. O'Brien*, Fed. Cas. 9,586; *In re Lake*, Fed. Cas. 7,992; *Stevens v. Bank*, 101 Mass. 109.

16. Compare Act of 1867, § 14, R. S., § 5044.

that they differ in meaning. The various subdivisions are considered *sciatim* later. Stated broadly, the rule is that the trustee takes all the property of the bankrupt, whether in possession or in action, at the time the petition was filed,<sup>17</sup> subject, of course, to the new rule as to vesting just considered. But he acquires title only to that which the bankrupt had at that time. Property not then owned but acquired before the adjudication,<sup>18</sup> and surely property acquired after it and before the discharge,<sup>19</sup> does not vest in the trustee, but becomes the bankrupt's, clear of the claims of all creditors, save those after the commencement of the proceeding or those who, for statutory reasons, are not affected by the discharge.<sup>20</sup> Thus, though the title may not vest in a trustee for months or even years, the line of cleavage as to divisible property is the date the petition is filed. The only exceptions to this rule are stated in subdivision d, considered *post*.

*Subject to all Claims, Liens, and Equities.*—It is well settled that the trustee takes not as an innocent purchaser, but subject to all valid claims, liens, and equities.<sup>21</sup> Thus, he has no better title than the bankrupt had.<sup>22</sup> The cases under the present law are already numerous.<sup>23</sup> They are, however, so dependent on their own facts as to make a summary impossible. The general rule is well stated and the cases reviewed in the Chattanooga National Bank case.<sup>24</sup>

17. In *re* Pease, ante; In *re* Burka, supra. For peculiar cases bearing on this general doctrine, see In *re* Meyer, 5 Am. B. R. 593, 106 Fed. 828; *McFarland Carriage Co. v. Solanas*, 6 Am. B. R. 221, 108 Fed. 532.

18. In *re* Harris, ante.

19. In *re* Rennie, 2 Am. B. R. 182; In *re* Stoner, 5 Am. B. R. 402, 105 Fed. 752.

20. See § 17. In *re* West, 11 Am. B. R. 782, 128 Fed. 205.

21. *Chattanooga Nat. Bank v. Rome Iron Co.*, 4 Am. B. R. 441, 102 Fed. 755. Compare In *re* Standard Laundry Co., 7 Am. B. R. 254, 112 Fed. 126; In *re* Dow, Fed. Cas. 4,036.

22. In *re* N. Y. Econ. Pr. Co., 6 Am. B. R. 615, 110 Fed. 514. In Pennsylvania the vendee under a contract for a sale of land is regarded

as the real owner and the vendor has no lien thereon aside from his legal estate, or the remedy which he has by reason thereof; so where the vendee is adjudged a bankrupt before the purchase price is paid, the trustee succeeds to his interests and is entitled to the proceeds of the sale of certain removable fixtures erected thereon by the vendee. In *re* Clark & Co., 9 Am. B. R. 252, 118 Fed. 358.

23. For instance, In *re* Goldman, 4 Am. B. R. 100, 102 Fed. 122; *Morton v. Lumber Co.*, 5 Am. B. R. 850; *Spencer v. Duplan Co.*, 7 Am. B. R. 563, 112 Fed. 638. Compare *Marden v. Phillips*, 4 Am. B. R. 566. See also sub nom. "Reclamation Proceedings," post.

24. See foot-note 21.

Subs. a.]

Kinds of Property Which Vest.

**Subd. (1). Documents Relating to Bankrupt's Property.**— This subdivision requires no comment. The muniments of ownership follow the title. The bankrupt's books and papers are also in the control of the court.<sup>25</sup>

**Subd. (2). Patents, Copyrights, and Trade-Marks.**— These, it would seem, should vest, irrespective of the statute. There can be no doubt about it now. But where, though application has been made, the letters-patent have not yet been granted, the trustee takes no interest.<sup>26</sup> The similarity between these classes of property and those known as "personal privileges" should be noted.<sup>27</sup>

**Subd. (3). Personal Powers.**— This subsection is expressive of a general rule of law. A power which is beneficial to a bankrupt donee vests in his trustee; not so a power in trust.<sup>28</sup>

**Subd. (4). Property Fraudulently Transferred.**— This is the converse of the doctrine that trustees take title subject to equities; they also take title to property which the bankrupt has fraudulently transferred,<sup>29</sup> and in which, therefore, the creditors have equities. The trustee's interest in such property is stronger than was that of the creditors in whose stead he stands, for he has a title. The trustee is vested not only with the title of the property, but also with the creditors' rights of action with respect to property of the bankrupt fraudulently transferred or incumbered by him, and he may assail in their behalf all of such transfers and incumbrances to the same extent as though the debtor had not been declared a bankrupt.<sup>29a</sup> The trustee's remedy when title is claimed adversely is, as has been seen, usually a suit in the proper court. This subdivision should be read in connection with § 23, § 67-e, and § 70-e.

*Effect of a General Assignment.*—A general assignment, being not only a fraud on the act<sup>30</sup> but an act of bankruptcy, seems to

<sup>25</sup>. See Schedule B (6) in Form No. 1.

<sup>26</sup>. In re McDonnell, 4 Am. B. R. 92, 101 Fed. 239; In re Dann, 12 Am. B. R. 27, 129 Fed. 495.

<sup>27</sup>. See sub nom. "Licenses, Franchises and Personal Privileges," post.

<sup>28</sup>. Compare Subd. (5) discussed, post.

<sup>29</sup>. In re Yukon Woolen Co., 2 Am. B. R. 805, 96 Fed. 326; In re McNamara, 2 Am. B. R. 566.

<sup>29a</sup>. In re Rodgers, 11 Am. B. R. 79 (C. C. A.), 125 Fed. 169; In re Butterwick, 12 Am. B. R. 536, 131 Fed. 371.

<sup>30</sup>. See In re Gray, 3 Am. B. R. 647. See also Section Twenty-three of this work.

stand on a different footing from fraudulent transfers *per se*. The assignment being void by operation of law,<sup>31</sup> no title passes, and the general assignee does not become an adverse claimant, but at most but an agent of the assignor. Property of the bankrupt in his possession or that of his agent can, therefore, be reached summarily by the method suggested in *Bryan v. Bernheimer*.<sup>32</sup>

**Subd. (5). Property Which Might Have Been Transferred or Levied Upon.**—This subdivision probably includes nearly, if not all, the kinds of property mentioned in the four that precede it, as well as that specified in subdivision (6). All of the other subdivisions are silent as to time. Here, however, there is a distinct reference to “the filing of the petition,” and the idea expressed in these words is, as to the enumerated kinds of property, doubtless implied. Thus, the doctrine that only property vested in the bankrupt at the time the petition is filed passes to the trustee, is emphasized. It will be noted that the words here are very general, and seem to include every vested right and interest attaching to or growing out of property. The test is simple and easily applied.<sup>33</sup> Could the property in question have been (1) transferred by or (2) levied on and sold under judicial process against the bankrupt? If so, it passes to the trustee; if not, it does not. Whether the property has a market value is immaterial.<sup>34</sup> Where under a state statute a plaintiff’s interest in a pending action is assignable, and is of such a character as to enable his creditors to obtain a benefit therefrom upon an administration of his estate, such interest has been held to be proper within the meaning of this subdivision rather than a “right of action,” under subdivision 6.<sup>34a</sup> The language of clause 5 is sufficiently broad to include not only the property belonging to the bankrupt absolutely, but also such property the title to which is, under a state law, held to be in him, as to his creditors.<sup>34b</sup> Any attempt to differentiate the cases would be useless. Those appropriate to the subjects discussed in the next five para-

31. *West Co. v. Lea*, 174 U. S. 590, 2 Am. B. R. 463.

32. 181 U. S. 188, 5 Am. B. R. 623.

33. Compare *In re Burka*, ante.

34. *Kizsie v. Winston*, Fed. Cas. 7,835.

34a. *Cleland v. Anderson*, 10 Am. B. R. 429 (Neb. Sup.).

34b. *Chesapeake Shoe Co. v. Seldner*, 10 Am. B. R. 466 (C. C. A.), 122 Fed. 593; *In re Tweed*, 12 Am. B. R. 648.

Subs. a.]

Remainders and Interests in Trust.

graphs are there collated. Others of a miscellaneous character will be found in the foot-note.<sup>35</sup>

*Remainders and Interests in Trust.*—Considerable difficulty is often experienced in applying the test fixed by subdivision (5) to contingent interests. Reference must usually be had to the state statutes and decisions. The following summary is, however, thought to be quite generally applicable: Vested remainders,<sup>36</sup> even if contingent, pass to a trustee;<sup>37</sup> but do not where the contingency is one both of time of vesting and of person.<sup>38</sup> Where the interest of the bankrupt depends on the exercise of a discretionary power in trust, it does not pass to his trustee.<sup>39</sup> But the

35. As to property of a partnership: In re Rudnick, 4 Am. B. R. 531, 102 Fed. 750; In re Groetzinger, 6 Am. B. R. 399. As to mortgaged realty: In re Kellogg, 7 Am. B. R. 623, 113 Fed. 120; affirmed 10 Am. B. R. 7, 121 Fed. 333. As to the proceeds of a sale under a void execution still in the hands of the sheriff: In re Easley, 1 Am. B. R. 715, 93 Fed. 419; In re Kenney, 2 Am. B. R. 494, 95 Fed. 427; on reargument, 3 Am. B. R. 353, 97 Fed. 554; affirmed, 5 Am. B. R. 355, 105 Fed. 897. Compare also In re Francis-Valentine Co., 2 Am. B. R. 188, 93 Fed. 953; In re Kimball, 3 Am. B. R. 161, and Levor, Trustee v. Seiter, 8 Am. B. R. 459. As to property vested in a receiver in the state court: In re Meyers & Co., 1 Am. B. R. 347; In re Tyler, 5 Am. B. R. 152, 104 Fed. 778; Hanson v. Stephens, 11 Am. B. R. 172 (Ga. Sup.). As to exercise of right to redeem: In re Goldman, ante; In re Novak, 7 Am. B. R. 27, 111 Fed. 161. As to unpaid legacy: In re May, 5 Am. B. R. 1. As to rents: In re Cass, 6 Am. B. R. 721; In re Dole, 7 Am. B. R. 21, 110 Fed. 926; In re Oleson, 7 Am. B. R. 22, 110 Fed. 796. As to a wife's interest in property vested in her husband: In re Garner, 6 Am. B. R. 596. Compare In re Rooney, 6 Am. B. R. 478. As to title of stocks bought by broker for customer: In re Swift, 7 Am. B. R. 374, 112 Fed. 315. As to stocks pledged by bankrupt pledgee: Hutchinson v. Le Roy, 8 Am. B. R. 20, 113 Fed. 212. As to delivery sufficient to pass title as

against debtor's trustee: Allen v. Hollander, 11 Am. B. R. 753, 128 Fed. 159. As to proceeds of property belonging to another sold by a bankrupt: In re Wood & Malone, 9 Am. B. R. 615, 121 Fed. 599. As to shares of stock fraudulently carried in the name of the bankrupt as trustee, and in the names of other parties for the purpose of concealment: Fowler v. Jenks, 11 Am. B. R. 255 (Minn. Sup.). Right of trustee of bankrupt tenant to crops under lease: In re Luckenbill, 11 Am. B. R. 455, 127 Fed. 984. As to money paid upon stock subscription, to be returned on certain conditions: In re North Carolina Car Co., 11 Am. B. R. 488, 127 Fed. 178. As to bankrupt's interest in an unadministered estate: Osmun v. Galbraith, 9 Am. B. R. 339 (Mich. Sup.). Miscellaneous: In re Cobb, 3 Am. B. R. 129, 96 Fed. 821; In re Hanna, 5 Am. B. R. 127; In re Swift, 5 Am. B. R. 232; Duplan Silk Co. v. Spencer, 8 Am. B. R. 367, 115 Fed. 689; reversing s. c., 7 Am. B. R. 563.

36. In re Woodard, 2 Am. B. R. 339, 95 Fed. 260; In re McHarry, 7 Am. B. R. 83, 111 Fed. 498. Compare In re Mosier, 7 Am. B. R. 268, 112 Fed. 138.

37. In re Shenberger, 4 Am. B. R. 487, 102 Fed. 978; In re St. John, 5 Am. B. R. 190, 105 Fed. 234; In re Twaddell, 6 Am. B. R. 539, 110 Fed. 145.

38. In re Hoadley, 3 Am. B. R. 780; In re Gardner, 5 Am. B. R. 432.

39. In re Wetmore, 4 Am. B. R. 335, 102 Fed. 290; s. c. affirmed, 6

surplus income from a beneficial interest created for the support of the bankrupt vests.<sup>40</sup> Where, though title is in the bankrupt, another is the real party in interest under the doctrine of resulting trust, the trustee in bankruptcy will be directed to convey to the real owner.<sup>41</sup> It seems also that, where the bankrupt mingles trust funds with his own so that their identity is lost, the beneficiaries must share *pari passu* with the creditors.<sup>42</sup> But if there has been no mingling, the trustee of a bankrupt estate takes no title, though he has the right to possession and a quasi-interest until the beneficiaries prove their right.<sup>43</sup> Cases under former laws will be found in the foot-note.<sup>44</sup>

*Dower and Curtesy Rights.*—Here also the state law controls. It is the general rule that, if the doweress is the bankrupt and her estate is vested, the trustee takes her interest;<sup>45</sup> conversely, if her interest is still inchoate, it does not pass. So also of the husband's curtesy: if vested, it passes; if merely initiate, it does not.<sup>46</sup> Where, however, the husband, not the wife, is the bankrupt, her inchoate interest is, in most States, sufficiently vested to endure, and the husband's title passes to the trustee subject thereto;<sup>47</sup> if the husband dies after his bankruptcy, she is entitled to the same interest she would have taken had he died before it.<sup>48</sup> On the other hand, where the wife is the bankrupt, the husband is not entitled to have his curtesy initiate admeasured. These doctrines flow from well-recognized principles of real-estate law. Cases collaterally valuable will be found in the foot-note.<sup>49</sup>

Am. B. R. 210, 108 Fed. 520. See also s. c. on application for discharge, 3 Am. B. R. 700, 99 Fed. 703. Compare *In re Ehle*, 6 Am. B. R. 476.

40. *In re Baudouine*, 3 Am. B. R. 651, 101 Fed. 574; *Brown v. Barker*, 8 Am. B. R. 450. Compare *Smith v. Belden*, 6 Am. B. R. 432, for method of reaching such a surplus.

41. *In re Davis*, 7 Am. B. R. 258.

42. *In re Richard*, 4 Am. B. R. 700, 104 Fed. 792; *In re Marsh*, 8 Am. B. R. 576, 116 Fed. 396; *In re Kurtz*, 11 Am. B. R. 129, 125 Fed. 992; *In re Mulligan*, 9 Am. B. R. 8, 116 Fed. 715.

43. *In re Cobb*, 3 Am. B. R. 129, 96 Fed. 821. If the trust is coupled with an interest, he becomes vested with the interest. *Walker v. Siegel*, Fed. Cas. 17,085.

44. *Nicholas v. Eaton*, 91 U. S. 716; *Sanford v. Lackland*, Fed. Cas. 12,312; *Durant v. Hospital, etc., Co.*, Fed. Cas. 4,188.

45. Compare *In re Watterson*, 95 Pa. St. 312.

46. *Hesseltine v. Prince*, 2 Am. B. R. 600, 95 Fed. 802.

47. *In re Schaeffer*, 5 Am. B. R. 248, 104 Fed. 973; *In re Forbes*, 7 Am. B. R. 42; *Porter v. Lazear*, 109 U. S. 84; *Matter of Hawkins*, 9 Am. B. R. 598. But see *Kelly v. Strange*, Fed. Cas. 7,676.

48. *In re Hester*, Fed. Cas. 6,437. But see *Bosteck v. Jordan*, 54 Tenn. 370.

49. *Hawk v. Hawk*, 4 Am. B. R. 463, 102 Fed. 679; *In re Garner*, 6 Am. B. R. 596; *In re Rooney*, 6 Am. B. R. 478.



*Licenses, Franchises, and Personal Privileges.*—Property rights which by their terms are either nonassignable or restricted to the person originally acquiring them, often furnish puzzling problems. Thus of nonassignable leases. The English and American rules seem to be different; the better American opinion is that a bankruptcy, even if voluntary, is not a breach of a covenant not to assign.<sup>50</sup> A contract between a publisher and an author whereby the former undertakes to publish and market literary productions of the latter, is not assignable.<sup>50a</sup> Whether a franchise or a license passes to the trustee on the bankruptcy of its owner depends usually on the terms of the instrument creating it, or, if that is silent, on whether it in its nature calls for personal skill or discretion.<sup>51</sup> It is already well settled that a bankrupt's interest in a license to sell liquors passes to his trustee,<sup>52</sup> but this question is dependent upon the statute under which the license is issued.<sup>52a</sup> It has been held that the bankrupt may be ordered to transfer a seat in a stock exchange to his trustee.<sup>53</sup> But the question as to whether a seat in a stock exchange belongs to a bankrupt and is, therefore, to be administered as part of his assets by the trustee depends upon the facts in each particular case.<sup>53a</sup>

50. For the English rule, see *Doe v. Bevan*, 3 Maule & S. 353; *Doe v. Smith*, 5 Taunt. 795; *Dommett v. Bedford*, 3 Ves. 148. For the American, *Starkweather v. Cleveland Ins. Co.*, Fed. Cas. 13,308; *Perry v. Lorillard*, 61 N. Y. 214; *In re Bush*, 11 Am. B. R. 415, 126 Fed. 878, holding that a tenant's covenant not to assign his lease without the landlord's permission in writing does not apply to an adjudication of the tenant's bankruptcy.

50a. *Matter of McBride*, 12 Am. B. R. 81.

51. *Parsons on Contracts*, Part II, chap. 12, § 9; *People v. Duncan*, 41 Cal. 507; *Stewart v. Hargrove*, 23 Ala. 429.

52. *In re Brodbine*, 2 Am. B. R. 53, 93 Fed. 643; *In re Fisher*, 3 Am. B. R. 406, 98 Fed. 88; affirmed as *Fisher v. Cushman*, 4 Am. B. R. 646, 103 Fed. 860; *In re Becker*, 3 Am. B. R. 412, 98 Fed. 407; *In re May*, 5 Am. B. R. 1. Compare *In re Emrich*, 4 Am. B. R. 89, 101 Fed. 231.

52a. *In re McArdle*, 11 Am. B. R. 358, 126 Fed. 442, in which case the

court applied the case of *In re Fisher*, supra, as limiting the right of a trustee to realize upon the value of a liquor license to a case where the granting authority gave its assent thereto; it was there held that a bankruptcy court should not enforce the claim of a mortgagee to the proceeds of the bankrupt's liquor license, where the granting power, on grounds of public policy and interest, declines to recognize any right in the licensee to mortgage his license, and any claim of the mortgagee therein. *In re Olewine*, 11 Am. B. R. 40, 125 Fed. 840.

53. *In re Gaylord*, 7 Am. B. R. 195, 111 Fed. 717.

53a. *Burleigh v. Foreman*, 12 Am. B. R. 88 (C. C. A.), 130 Fed. 13, reversing 9 Am. B. R. 237. For instance, in the case of *Page v. Edmunds*, 187 U. S. 596, 9 Am. B. R. 277, affirming 5 Am. B. R. 707, 107 Fed. 89, it was held that a seat or partnership in a stock exchange which by its articles provided that a member may sell his partnership provided there is no unsettled contract, the

*Life Insurance Policies.*—These rights are akin to those personal privileges just considered. The bankrupt is obliged to enumerate such policies in Schedule B (3) accompanying his petition. Here, also, the test is: was the interest of the insured transferable or subject to levy? If the policy has a cash surrender value, payable to the bankrupt, and enforceable by him<sup>56a</sup> it surely passes to the trustee.<sup>54</sup> Indeed, it is thought that if there be no such value, but an actual value,<sup>55</sup> it still passes. This is so, even without the consent or assignment of the beneficiary, and the bankrupt may be ordered to execute any necessary papers to accomplish the transfer.<sup>56</sup> Where, however, there is no actual value, as, for instance, in "ordinary life" policies, nothing passes to the trustee. Where a policy has been pronounced valueless and turned over to the bankrupt, and the premiums thereof are paid either by himself or his wife, and the bankrupt dies soon after the policy is so turned over, the proceeds of the policy do not belong to his estate in bankruptcy.<sup>56a</sup> This subsection does not include policies payable to the wife or kindred of the insured, but only applies to policies payable to the insured or his personal representatives.<sup>56b</sup> The meaning and effect of the proviso clause in subdivision (5) is considered in a later paragraph.<sup>57</sup>

*Property Sold to the Bankrupt on Condition.*—Here also the interest of the bankrupt's trustee depends on the law of the State.<sup>58</sup>

claim against him by any other member of the exchange, arising out of the business of the exchange, subject to the approval of the proper authorities, is property which prior to the filing of the petition the bankrupt might have transferred, and which, therefore, passes to and vests in his trustee.

53b. In re Mertens, 12 Am. B. R. 712.

54. In re Boardman, 4 Am. B. R. 620; In re Diack, 3 Am. B. R. 723, 100 Fed. 770; In re McDonnell, 4 Am. B. R. 92, 101 Fed. 239.

55. In re Mertens, 12 Am. B. R. 712; In re Welling, 7 Am. B. R. 340, 113 Fed. 189; In re Slingluff, 5 Am. B. R. 76, 106 Fed. 154, repudiating In re Hernick, 1 Am. B. R. 713. See also In re Holden, 7 Am. B. R. 615, 113 Fed. 141. Contra, In re Buelow, 3 Am. B. R. 389, 98 Fed.

86. See also In re Becker, 5 Am. B. R. 438, 106 Fed. 54.

56. In re Diack, ante. For the duty of the trustee touching policies of life insurance, see In re Welling, supra.

56a. Meyers v. Josephson, 10 Am. B. R. 687, 124 Fed. 734.

56b. Pulsifer v. Hussey, 9 Am. B. R. 657, 97 Me. 434.

57. Fire insurance policies are rarely an asset, unless a fire loss has occurred just prior to the bankruptcy. Compare In re Hamilton, 4 Am. B. R. 543, 102 Fed. 683. The bankruptcy of the insured is not such a transfer of title as to render a policy void under a clause giving that effect to a change of ownership. Starkweather v. Cleveland Ins. Co., ante.

58. A leading case is In re Garcewich, 8 Am. B. R. 149, 118 Fed. 87. See also In re Burkle, 8 Am. B. R.

Subs. a.]

Property Sold to Bankrupt on Condition.

If the bankrupt was in possession under a contract invalid as to creditors, as, for instance, because not filed in accordance with that law, both possession and title pass to the trustee.<sup>59</sup> But creditors are not purchasers or lienors.<sup>60</sup> Under a statute providing that an unrecorded contract of conditional sale is void only as against subsequent purchasers, pledgees or mortgagees in good faith, a failure to record such a contract prior to the adjudication in bankruptcy of the vendee does not affect the title of the conditional vendee as against the vendee's trustee.<sup>60a</sup> Where seizure is necessary to establish the creditors' rights, title will not pass unless seizure is made before the bankruptcy.<sup>61</sup> Where, however, the property is merely consigned for sale, the bankrupt is not a vendee on condition. As to the avails of goods so consigned, but sold by him before the bankruptcy, the funds being mingled with his own, title thereto passes to the trustee.<sup>61a</sup> Where consigned goods are found among the assets and identified by the consignor, but not otherwise, the trustee should apply for an order permitting him to release them to the real owner. In actual practice, this is frequently done. Care should be taken to distinguish between goods sold on condition and goods consigned, and positive identification of the latter should be required.<sup>62</sup> The contract under which goods were sold to the bankrupt contained no limitation upon the right to sell and only prescribed the method of making payment, and contained a provision to the effect that the title and ownership of the goods purchased and the proceeds of the sale thereof should remain the property of the seller; such contract was held to create a secret lien constituting a fraud upon the creditors of the bankrupt, and was invalid as against his trustee in bankruptcy.<sup>62a</sup>

542, 116 Fed. 766, and *In re Howland*, post.

59. *In re Yukon, etc., Co.*, 2 Am. B. R. 805, 96 Fed. 326; *In re Frazier*, 9 Am. B. R. 21, 117 Fed. 575; *Chesapeake Shoe Co. v. Seldner*, 10 Am. B. R. 466, 122 Fed. 593. Compare *In re Leigh Bros.*, 96 Fed. 806, affirming 2 Am. B. R. 606; *In re Howland*, 6 Am. B. R. 495, 109 Fed. 869.

60. *In re Bozeman*, 2 Am. B. R. 809; *In re Kellogg*, 7 Am. B. R. 270, 112 Fed. 52; *In re Hinsdale*, 7 Am. B. R. 85, 111 Fed. 502. Compare *In re McKay*, 1 Am. B. R. 292.

60a. *Hewitt v. Berlin Machine Works*, 194 U. S. , 11 Am. B. R. 709. Compare *In re Tweed*, 12 Am. B. R. 648.

61. *In re Ohio, etc., Co.*, 2 Am. B. R. 775.

61a. Compare *Bills v. Schliep*, 11 Am. B. R. 607, 127 Fed. 103.

62. *Adams v. Meyers*, Fed. Cas. 62. See *In re Levin*, 11 Am. B. R. 446, 127 Fed. 886.

62a. *In re Galt*, 9 Am. B. R. 632, 120 Fed. 443; *In re Computer*, 11 Am. B. R. 147, 125 Fed. 831, in which case it was held that a similar

*Property Affected by Fraudulent Representations.*—Since the trustee takes the bankrupt's property charged with all claims and equities against it, his title to the same is inferior to that of one who was induced to sell on materially false representations. In such cases, the claimant usually proceeds as in replevin.<sup>63</sup> But, where the property is in the custody of the bankruptcy court, it is immune from replevin process in the state court.<sup>64</sup> It has been held that the false representation need not be the sole and exclusive consideration for the credit, but only a material consideration;<sup>65</sup> also, that false representations to a mercantile agency are enough.<sup>66</sup> Other cases under the present law appear in the footnote.<sup>67</sup>

*Reclamation Proceedings.*—These may be in or out of the bankruptcy proceeding. A petition to reclaim consigned goods is an instance of the former;<sup>68</sup> the proceeding in the nature of a bankruptcy replevin which, in most large trade centers, has of late been so common if not notorious, is an instance of the latter. The evils resulting from so-called "reclamation proceedings" are patent and hard to overcome.<sup>69</sup> In effect, estates are often dissipated by greedy and not over-scrupulous creditors, who apply for possession, after recession, on the ground of alleged fraudulent representations, and are granted what they ask, without adequate judicial investigation of their right to it and before there is a court officer authorized to bond back the goods reclaimed.<sup>69a</sup> Their right to possession on a

agreement passed the title to the goods sold to the vendee, to which title the trustee in bankruptcy succeeded; that there was no purpose apparent therefrom to create an agency in the vendee, nor could such agreement be sustained as a conditional sale, a mortgage, or an instrument attempting to create a lien in behalf of the seller. See also *In re Tweed*, 12 Am. B. R. 648; *In re Butterwick*, 12 Am. B. R. 536, 131 Fed. 371.

63. See next paragraph.

64. *In re Russell*, 3 Am. B. R. 658, 101 Fed. 248; *In re Mertens*, 12 Am. B. R. 698.

65. *In re Gany*, 4 Am. B. R. 576.

66. *In re Epstein*, 6 Am. B. R. 60, 109 Fed. 878; *In re Roalswick*, 6 Am. B. R. 752; *In re Weil*, 7 Am. B. R. 90, 111 Fed. 897.

67. *In re Davis*, 7 Am. B. R. 276, 112 Fed. 294; *In re O'Connor*, 7 Am. B. R. 428, 114 Fed. 777.

68. See sub nom. "Property Sold to the Bankrupt on Condition" in this Section, ante.

69. These are pointed out with great distinctness in an address delivered by Charles A. Hough, Esq., of New York, printed in the proceedings of the Fourth Annual Convention of the National Association of Referees in Bankruptcy, at Milwaukee, in August, 1902. See also Address on "The Merits and Defects of the Bankrupt Law," by Mr. Referee Holt, before the American Social Science Association, at Washington, April, 1902.

69a. See *Matter of Murphy*, etc., *Shoe Co.*, 11 Am. B. R. 428, holding that the right to reclaim goods should

## Subs. a.]

## Reclamation Proceedings.

proper showing cannot be doubted.<sup>70</sup> For instance, it is well settled that false representations as to the financial status of a buyer, made as a basis of credit, and but for which the sale would not have been made, was fraudulent, and entitled the seller to reclaim the goods thereby obtained.<sup>70a</sup> Where machinery or other articles are sold upon the condition that if they are not satisfactory the purchaser may return them and such purchaser prior to his bankruptcy expressed himself as dissatisfied and declared that he would not accept such machinery or articles, the seller may reclaim them, and the receiver or trustee of the bankrupt purchaser will not be heard to say that the refusal of the bankrupt to accept was arbitrary or capricious, fraudulent and in bad faith.<sup>70b</sup> Reclamation proceedings are, however, so new a device of the preferentially inclined that there are few reported precedents.<sup>71</sup> Most of the evils resulting will, however, be avoided if the claiming creditor is at least required in the first instance, always after a short notice to the receiver or creditors, to prove identity strictly, either before the judge or a referee sitting as special master. The delay incident to such proof will check

only be granted in cases where it clearly exists, and that the burden of proof is with the creditors to establish their right clearly and by a preponderance of evidence.

70. This follows from the rule that the trustee when appointed can have no greater title than the bankrupt had. The trustee holds the goods affected with the fraud of the bankrupt. Neither law nor morals will justify the trustee in holding goods obtained by the fraud of the bankrupt for the benefit of other creditors. Creditors have no right to profit by the fraud of the bankrupt to the wrong and injury of the party who has been deceived and defrauded. In *re Hamilton Furniture, etc., Co.*, 9 Am. B. R. 65, 117 Fed. 774.

70a. *Matter of Patterson*, 10 Am. B. R. 748, 125 Fed. 562; In *re Weil*, 7 Am. B. R. 90, 111 Fed. 897; In *re Epstein*, 6 Am. B. R. 60, 109 Fed. 878; In *re Hamilton Furniture, etc., Co.*, 9 Am. B. R. 65, 117 Fed. 774, in which case the rule was laid down that where a party by fraudulently concealing his insolvency, and his in-

tent not to pay for goods, induces the owner to sell them to him on credit, the seller, if no innocent third party has acquired an interest in them, is entitled to disaffirm the contract and recover the goods; In *re Hildebrant*, 10 Am. B. R. 184; In *re O'Connor*, 9 Am. B. R. 18, 114 Fed. 777.

70b. In *re Hill Co.*, 12 Am. B. R. 213, note, 123 Fed. 866. Compare In *re Simpson Mfg. Co.*, 12 Am. B. R. 212 (C. C. A.), 130 Fed. 307, in which case the evidence was considered, and it was held that there being no complaint made that the machinery was unsatisfactory, a sale of the machinery was completed, and that the vendor upon the bankruptcy of the purchaser was not entitled to a return of the machinery upon a claim that it was never accepted.

71. For cases where the claim was judicially investigated, see In *re Weil*, 7 Am. B. R. 90, 111 Fed. 897; In *re Davis*, 7 Am. B. R. 276, 112 Fed. 294; and *Bloomington v. Empire Rubber Mfg. Co.*, 8 Am. B. R. 74, 114 Fed. 1016. Read also In *re O'Connor*, 7 Am. B. R. 428, 114 Fed. 777.

at the outset a practice which, under the state systems, has fostered perjury and made "diligence" a word at which lawyer and layman were wont to blush. Nor is it thought that such a practice will be against the well-recognized principle that adverse claims to the bankrupt's assets must be settled in a plenary suit.<sup>72</sup> Identity is the *sine qua non* of the right to possession. Proof of it is insisted on even in the far less important proceeding when a consignor creditor claims goods in the hands of the trustee. The court whose right to possession is questioned can, it is thought, nay, in the interest of that pro-rating which the bankruptcy law commands, should, insist on the claimant establishing identity by proof in open court, with right to cross-examination by the adverse party, before yielding that which in bankruptcy cases is often more than "nine points of the law." This practice is outlined in the case cited in the foot-note.<sup>73</sup>

**Subd. (6). Rights of Action.**— This subdivision is declaratory of the law. Causes of action for personal injuries are not usually assignable.<sup>74</sup> Yet the courts have often been willing to justify exceptions to this inequitable doctrine. Thus, where the suit is to recover usurious interest paid by the bankrupt,<sup>75</sup> and money lost in gaming,<sup>76</sup> and perhaps where the gravamen is deceit or fraud.<sup>77</sup> The cases are by no means uniform. The safe rule is that stated in the text: that the trustee is vested with the bankrupt's rights of action on contract and for the unlawful taking or detention of or injury to his property. An action for conspiracy, whereby the plaintiff was "driven out of business as a dealer in lumber," is an action in tort, and is not included within the rule; even though such an action is pending at the time of the plaintiff's bankruptcy, the right of action does not pass to his trustee.<sup>77a</sup> But it has been held otherwise as to a right of action for injuries causing the death of the bankrupt's son.<sup>77b</sup> It has been held that a person who has been adjudged a bankrupt and obtained his discharge cannot sue upon a claim for services

<sup>72</sup>. In re Russell, 3 Am. B. R. 658, 101 Fed. 248.

<sup>73</sup>. In re Coleman v. Sherman, 8 Am. B. R. 763.

<sup>74</sup>. Noonan v. Orton, 12 N. B. R. 405; Beckham v. Drake, 8 Mees. & W. 845.

<sup>75</sup>. Tiffany v. Boatmen's Sav. Inst., 18 Wall. 375; Wheelock v. Lee,

64 N. Y. 242. But see Bromley v. Smith, Fed. Cas. 1,922.

<sup>76</sup>. Meech v. Stoner, 19 N. Y. 26.

<sup>77</sup>. In re Crockett, Fed. Cas. 3,402; Hyde v. Tufts, 45 Super. Ct. (N. Y.) 56.

<sup>77a</sup>. Cleland v. Anderson, 11 Am. B. R. 605 (Neb. Sup. Ct.).

<sup>77b</sup>. In re Burnstine, 12 Am. B. R. 596.

upon a *quantum meruit*, which arose prior to the filing of his petition, where it appears that he did not disclose the existence of the claim or any other asset, in the bankruptcy proceedings, because of which no trustee was appointed.<sup>77c</sup> It seems that, after being vested in the trustee, such rights of action may be carried to judgment by the bankrupt for his own benefit after a composition is confirmed.<sup>78</sup>

**Burdensome Property.**—Here the statute is silent. The English law goes into this subject with considerable particularity, the trustee there being given twelve months in which to elect to claim or disclaim onerous property.<sup>79</sup> The general rules phrased into that law are, however, doubtless also the law in this country. Thus, a trustee may disclaim burdensome property and has a reasonable time in which to do it.<sup>80</sup> This doctrine is usually asserted as to leases,<sup>81</sup> though it has been applied where property is mortgaged beyond its value, in which case the court may direct that the property be released and surrendered to the mortgagee upon such conditions as it may deem just.<sup>81a</sup> The question is not one of jurisdiction or of right, but of discretion.<sup>82</sup>

**Practice.**—This is simple. The trustee, if satisfied, after appraisal or even on an independent investigation, that some or all of the property which has vested in him is of no value or will be a charge on the estate, should file a report to that effect and ask for instructions. The referee may, it is thought, act without calling a meeting of creditors or even submitting the application to a pending meeting; but safe practice suggests that the creditors be consulted and their wishes observed. If the trustee is instructed to disclaim the property as onerous, an order should be entered to that effect. This in effect revests the title in the bankrupt.<sup>83</sup> Leases should be accepted or disclaimed promptly, but a continuance in possession will

77c. *Rand v. Iowa Central Ry. Co.*, 12 Am. B. R. 164, 96 App. Div. (N. Y.) 413.

78. See *Stone v. Morris*, 4 Am. B. R. 568.

79. Act of 1883, § 55, as amended by Act of 1890, § 13.

80. Compare *Glenny v. Langdon*, 98 U. S. 20; *Sparhawk v. Yerkes*, 142 U. S. 1; *In re Scheermann*, 2 N. B. N. Rep. 118, and cases cited. See also "Supplementary Forms," post.

81. For instance, see *Baldwin on Bankruptcy*, 8th ed., pp. 281-291, and *General Rule (Eng.)* 320; also numerous cases in this country.

81a. *Equitable Loan & Security Co. v. Moss & Co.*, 11 Am. B. R. 111 (C. C. A.), 125 Fed. 609.

82. *In re Cogley*, 5 Am. B. R. 731, 107 Fed. 73; *In re Dillard*, Fed. Cas. 3,912.

83. *Sessions v. Romadka*, 145 U. S. 29.

not usually be construed an election to accept the burdens and obligations of the lease<sup>84</sup> Another method of disposing of burdensome property is to sell it at a meeting of creditors called for that purpose. This is often done at final meetings, and sometimes at the instance of lien creditors, who thereby get title without the usual delays and costs attending foreclosures and judicial sales.

**Exempt Property.**—The trustee does not take title to property exempt by the law of the State, but, until the exempt property is set off, has possession.<sup>84a</sup> This subject has been fully considered elsewhere.<sup>85</sup>

*Conflict Between § 6 and § 70-a (5).*—The proviso clause in subdivision (5) has already been often considered by the courts. It was doubtless inserted to prevent the hardship which might result to beneficiaries of life insurance policies did the latter pass to the insured's trustee absolutely. In effect, the bankrupt may retain the advantage which years of premiums may have given him, provided he pays or secures to the estate the cash surrender value of the policy. The practice is sufficiently indicated by the words of the statute. But the question generally discussed is whether, since most of the States declare life insurance policies exempt, the clause here is subject to § 6, or a limitation on it. The cases are not uniform, but the weight of authority is that the clause indicates an intention on the part of Congress to except life insurance policies from the general rule as to exemptions and that § 6 does not, therefore, apply.<sup>86</sup> Thus, such policies are assets, even though exempt under the state laws, and, if not reclaimed by the bankrupt under § 70-a (5), pass to the trustee, and that, too, in spite of the inchoate interest of the beneficiary. This seems to be so, even if the policy has not strictly a cash surrender value; an actual value is enough.<sup>87</sup> But, to come within these decisions, the policy must be payable either on death or after a specified period of years, to the bankrupt or his estate or personal representatives.<sup>88</sup>

84. See Section Seventeen of this work.

84a. *McKenney v. Cheney*, 11 Am. B. R. 54 (Ga. Sup.).

85. See in Section Six, ante. And compare §§ 2 (11) and 47-a (11); also General Order XVII.

86. *In re Lange*, 1 Am. B. R. 189, 91 Fed. 361; *In re Steele*, 3 Am. B.

R. 549, 98 Fed. 78; *In re Scheld*, 5 Am. B. R. 102, 104 Fed. 870; *In re Holden*, 7 Am. B. R. 615, 113 Fed. 141. Contra, *Steele v. Buel*, 5 Am. B. R. 165, 104 Fed. 968, reversing *In re Steele*, supra.

87. *In re Welling*, 7 Am. B. R. 340, 113 Fed. 189.

88. *In re Steele*, supra.



## II. Subs. b. APPRAISERS AND APPRAISAL.

**In General.**—The only reference to appraisers occurs here. The words seem to require the appointment of appraisers in every case. At the same time, it is not thought that this is so far jurisdictional as to make defective a title sold by a trustee without appraisal. Three appraisers, not two or one, must be appointed. They must be disinterested; this excludes creditors and all other persons having an interest in the proceeding. The appointment may be, in fact, usually is, made by the referee. Their fees are discretionary, the statute being silent, and are fixed in some districts by general rule, in others by order in each case. They are usually in the form of a *per diem*, and are moderate rather than large. Inasmuch as the appraisal is often the key to the administration of asset cases and knowledge of the percentage of cost price used in getting at values essential to bidders and court alike, one of the appraisers should be selected and serve as the representative of the referee. Such a practice will, it is thought, check collusive bidding and inadequate prices at subsequent sales. It has been held that the prevailing cost to the trade should be adopted as the actual value.<sup>89</sup>

**Practice.**—In no-asset cases appraisers are not needed, or often appointed. In asset cases, their appointment should be moved at the first meeting of creditors. Where possible, the wishes of the creditors should be consulted as to their choice. The appointment is evidenced by an order.<sup>90</sup> An oath of office must be taken.<sup>91</sup> The appraisal should be made as soon as possible; no notice to creditors or parties in interest is required. When made, it is reduced to writing,<sup>92</sup> signed by the appraisers, and filed with the referee. With it, should be filed affidavits of the number of days actually spent by each appraiser; this for the guidance of the referee in fixing the fees.<sup>93</sup>

## III. Subs. b. SALES OF PROPERTY.

**In General.**—The subject of sales is largely controlled either by rules or by the order of the court in each case. Here the present law differs materially from that of 1867. The latter, especially after

89. In re Prager, 8 Am. B. R. 356.

90. Form No. 13.

91. Id.

92. Id.

93. See, generally, 1 N. B. N. 179, and Rule 13, Erie Co. (N. Y.) District in 1 N. B. N. 114. Compare also In re Grimes, 2 Am. B. R. 730, 96 Fed.

the amendments of 1874, regulated sales with much particularity.<sup>94</sup> Subject to the statute and General Orders XXI and XXII interpreting it, the assignee (trustee) then had a large discretion as to sales. Cases under that law should, therefore, be cited with caution. The present statute, after, in general words,<sup>95</sup> conferring jurisdiction on courts of bankruptcy to convert estates into money and distribute them, and charging this duty on the trustee,<sup>96</sup> limits the latter's powers by the words "under the direction of the court," in § 70-b, and then, as to sales, provides that the same, when practicable, shall be made subject to the approval of the court; indeed, that no sale at less than 75% of the appraised value shall be made without such approval. Upon a true construction of this subsection, a sale of the bankrupt's property is in all circumstances subject to the approval of the court when practicable, and any sale for which an approval was unquestionably practicable, conveys no title until it is confirmed, and a setting aside of the sale is equivalent to a refusal to confirm.<sup>96a</sup> This subsection and the one that follows are, other than those in § 58-a (4), the only words of the present statute having to do with the reduction of a bankrupt's property into money. Thus, the only statutory check on absolute discretion is that creditors are entitled to notice of all proposed sales. This latter restriction is, as we have seen, unfortunate. The subject is, however, one of practice rather than law. This is recognized in General Order XVIII and the numerous special rules regulating sales in the different districts.

*Illustrative Cases.*—Under the present law, the following doctrines have been laid down: A referee has power to order and confirm a sale;<sup>97</sup> but not before the adjudication.<sup>98</sup> Only perishable property should be sold before the latter time, even by the court,<sup>99</sup> though, if ordered, the trustee, when appointed, may doubtless be directed to ratify a receiver's sale, and thus perfect the purchaser's title. Sales regularly and fairly made will not, as a rule, be disturbed on the ground of mere inadequacy of price, unless for fraud or the stifling

529; *In re Jamieson*, 6 Am. B. R. 601.

94. See "Analogous Provisions" at head of this Section.

95. § 2 (7).

96. § 47-a (2).

96a. *In re Shea*, 11 Am. B. R. 207 (C. C. A.), 123 Fed. 153; s. c., 10 Am. B. R. 481, 122 Fed. 743.

97. *In re Matthews*, 6 Am. B. R. 96, 109 Fed. 603.

98. *In re Styer*, 3 Am. B. R. 424, 98 Fed. 290. Compare *In re Kelly Dry Goods Co.*, post.

99. *In re Kelly Dry Goods Co.*, 4 Am. B. R. 528, 102 Fed. 747.

of bids, or the like.<sup>100</sup> An error as to the basis of value, made in the trustee's circular inviting bids, will not warrant a resale, where the purchaser had opportunity to ascertain the value, independently of the circular.<sup>101</sup> A sale of the bankrupt's equity of redemption in certain real estate, will be set aside where the trustee failed to give notice of the sale to an intending bidder, according to promise, and the petitioner filed an agreement to bid three times the amount bid at the first sale.<sup>101a</sup> Where a trustee himself is a purchaser, and the land subsequent to the sale increases in value, the sale should be set aside and resold, compensation to be made to the trustee for the price paid by him for the land and for the cost of improvements made thereon.<sup>101b</sup> Cases where property has been sold subject to or clear of liens are collated in a subsequent paragraph.

**General Order XVIII.**—This has been considered elsewhere.<sup>102</sup> It limits the discretion of the district and the referee courts. Its third paragraph applies the same rules to perishable property as were stated in the statute under the former law,<sup>103</sup> and the cases then decided are thought still applicable; those under the present law are considered elsewhere.<sup>104</sup> Its first paragraph compels sales at public auction, unless otherwise ordered by the court. The second paragraph is by far the most important. In seeming to dispense with notice to creditors, it is of doubtful validity, yet, as a way out of many an awkward situation, it is very generally availed of where the interests of creditors will be best subserved by an immediate sale at a specified bid. By its means, much larger prices are often obtained than could be at public auction. At the same time, in the face of the mandatory provision of § 58-a (4), this rule will be cautiously applied, and only where the moving papers show clearly either a necessity for immediate sale or a fair and adequate offer.

100. *In re Thompson*, 2 Am. B. R. 216; *In re Groves*, 2 N. B. N. Rep. 30; *In re Ethier*, 9 Am. B. R. 160, 118 Fed. 107. Compare *In re Findlay Bros.*, 4 Am. B. R. 745, for case where application was made to set aside unfair sale made by a general assignee before bankruptcy.

101. *Owens v. Bruce*, 6 Am. B. R. 322, 109 Fed. 72.

101a. *In re Shea*, 10 Am. B. R. 481, 122 Fed. 742. Compare *In re Belden*, 9 Am. B. R. 679, 120 Fed. 524, where the court refused to set

aside a sale of the bankrupt's interest in his father's estate, on the motion of one who has no interest in the matter except a desire to become a bidder and purchaser at a higher figure, especially where all the creditors oppose the motion, and protest in writing against a resale.

101b. *In re Hawley*, 9 Am. B. R. 61, 117 Fed. 364.

102. See in Section Fifty-eight.

103. § 25, R. S., § 5065.

104. See under Section Fifty-eight.

**Sales of Incumbered Property.**—Sales free of incumbrances were authorized by the statute of 1867.<sup>105</sup> The present law has no such provision. This has cast doubt on the power of the court to authorize such a sale. The cases are quite uniform, however, in declaring that such sales can be authorized, and by the referee<sup>105a</sup> as well as by the judge.<sup>106</sup> But they should not be ordered where it does not appear that they will be to the advantage of the bankrupt's estate,<sup>107</sup> as where there is no equity of redemption, or a state court has already been invoked to foreclose the lien.<sup>108</sup> If property is sold free of incumbrances and liens, provisions should be made for the protection of the rights of the several lien creditors in the fund derived from the sale, and such creditors may prosecute their claims to preference against such fund, even if they did not file exceptions to the return of sale.<sup>108a</sup> The property being sold free of all liens, the court having lawful custody of the property to which liens attached may determine the relative priorities of conflicting claims to the fund realized from the sale.<sup>108b</sup> Sales can, of course, be made subject to incumbrances, and the purchaser then takes the property charged therewith.<sup>109</sup> The practice is not different from that on sales of unincumbered property, and is sometimes regulated by local rules. If the order of sale contains no special direction

**105.** § 20, R. S., § 5075.

**105a.** As to sale free of liens by order of referee, see *In re Waterloo Organ Co.*, 9 Am. B. R. 427, 118 Fed. 904.

**106.** *In re Pittelkow*, 1 Am. B. R. 472, 92 Fed. 901; *In re Etheridge Furniture Co.*, 1 Am. B. R. 112, 92 Fed. 329; *In re Worland*, 1 Am. B. R. 450, 92 Fed. 893; *In re Sanborn*, 3 Am. B. R. 54, 96 Fed. 507; *In re Southern, etc., Co. v. Benbow*, 3 Am. B. R. 9, 96 Fed. 514; *Matter of New England Piano Co.*, 9 Am. B. R. 767 (C. C. A.), 122 Fed. 937; *In re Keet*, 11 Am. B. R. 117, 128 Fed. 651; *In re Shoe & Leather Reporter*, 12 Am. B. R. 248 (C. C. A.), 129 Fed. 588; *In re Prince & Walter*, 12 Am. B. R. 675. See also *In re Barber*, 3 Am. B. R. 306, 97 Fed. 547; *In re Utt*, 5 Am. B. R. 383, 105 Fed. 754; *In re Keller*, 6 Am. B. R. 351, 109 Fed. 131. See *In re Wilka*, 12 Am. B. R. 727, where it was held that a

referee may order personal property to be sold free of liens, upon notice to lienors, although the property, and a creditor having a mortgage thereon, are without the territorial jurisdiction of the court.

**107.** *In re Styer*, ante; *In re Schaeffer*, 5 Am. B. R. 248, 104 Fed. 973; *In re Goldsmith*, 9 Am. B. R. 419, 118 Fed. 763.

**108.** Compare *In re Gerdes*, 4 Am. B. R. 346, 102 Fed. 318.

**108a.** *Carroll & Bro. Co. v. Young*, 9 Am. B. R. 643, 119 Fed. 576. Compare *Chauncey v. Dyke Bros.*, 9 Am. B. R. 444, 119 Fed. 1; *In re Goldsmith*, 9 Am. B. R. 419, 118 Fed. 763; *In re Shoe & Leather Reporter*, 12 Am. B. R. 248 (C. C. A.), 129 Fed. 588; *In re Prince & Walter*, 12 Am. B. R. 675.

**108b.** *Chauncey v. Dyke Bros.*, 9 Am. B. R. 444, 119 Fed. 1.

**109.** *In re Gerry*, 7 Am. B. R. 459, 112 Fed. 957, 959.

## Subs. b.]

## Practice on Sales.

as to incumbrances, the purchaser under the rule of *caveat emptor* acquires only the rights of the bankrupt in the property, and the rights of those claiming an adverse interest therein are not affected.<sup>109a</sup> Equity requires that the order should provide that the notice to the lienors be ample, and personal rather than by mail,<sup>110</sup> and that a lienor, if the purchaser at the sale, may give a receipt to the amount of his lien in lieu of cash. Sales of this character often require the court of bankruptcy to determine the validity and priority of liens on the bankrupt's property — there was doubt as to its jurisdiction to do this prior to the amendatory act of 1903<sup>111</sup> — and important contests may arise on distribution.<sup>112</sup> This method of sale is chiefly valuable in those States which provide a redemption period on mortgage foreclosures.<sup>113</sup> It has been little used elsewhere. It has been held that, where real property of the bankrupt is sold under a mortgage foreclosure in a state court, such court has jurisdiction to appoint an auditor to distribute the fund realized upon the sale.<sup>113a</sup> Cases under former laws will be found in the foot-note.<sup>114</sup>

**Practice on Sales.**—It will be seen that a trustee has the option (1) of disclaiming the bankrupt's property, or (2) of selling it. If the latter, (a) he may sell it immediately without notice, if it be perishable, in which case the practice is indicated in Form No. 46;<sup>115</sup> or (b) he may sell it at public auction on notice using Form No. 42;<sup>116</sup> or (c) he may sell it at private sale under General Order XVIII (2) with or without notice, as the court shall direct, in which case Form No. 45, modified to fit the facts, should be used; or

109a. In re Mulhauser Co., 10 Am. B. R. 236 (C. C. A.), 121 Fed. 669.

110. Ray v. Norseworthy, 90 U. S. 128; In re Taliaferro, Fed. Cas. 13,736; In re Drewry, Fed. Cas. 4,081.

111. Compare In re San Gabriel, etc., Co., 7 Am. B. R. 206, 111 Fed. 892; on reconsideration of s. c., 4 Am. B. R. 197, 102 Fed. 310; In re Mulhauser, 10 Am. B. R. 236 (C. C. A.), 121 Fed. 669. And see also in Sections Eleven and Twenty-three, ante.

112. See In re Sanderlin, 6 Am. B. R. 384, 109 Fed. 857, for order of dis-

tribution. Consult also In re Gerry, 7 Am. B. R. 461, 112 Fed. 957, 959.

113. Compare In re Utt, ante; In re Novak, 7 Am. B. R. 267, 111 Fed. 978.

113a. Furth v. Stahl, 10 Am. B. R. 442, 205 Pa. St. 439.

114. Houston v. City Bank, 6 How. 486; In re Bowie, Fed. Cas. 1,728; In re McGilton, Fed. Cas. 8,798. See also Century Digest, "Bankruptcy," §§ 358-366.

115. This form is erroneous in so far as it recites a notice.

116. For a form of notice, see 1 N. B. N. 117.

(*d*) he may sell it subject to liens, when the practice is not unlike that on a sale of unincumbered property, though Form No. 44 should be used; or (*e*) he may sell it clear of liens, for which no form is provided but to which Form No. 44, with the additional recitals and directions indicated in the last paragraph, may be adapted, or (*f*) he may redeem it from liens, as provided in General Order XXVIII, in which event Form No. 43 should be used; or (*g*) he may sell unconverted assets as a part of the final meeting of creditors.<sup>117</sup> Space is lacking to enlarge on these different ways of converting a bankrupt's property into money, but any method fairly within the practice outlined above will, it is thought, accomplish the purpose.<sup>118</sup>

#### IV. Subs. c. TRANSFER OF TRUSTEE'S TITLE TO PURCHASER.

**In General.**—This subsection is expressive of the law. On the report of sale being confirmed, an order is usually entered directing the trustee to make the transfer on receipt of the consideration. The instrument of transfer should always recite what interest, as, for instance, the bankrupt's or the latter's free of liens, is transferred, and as to covenants, should be adapted to the forms used by the assignees or receivers under state laws.<sup>119</sup>

#### V. Subs. d. TITLE OF TRUSTEE WHERE COMPOSITION IS SET ASIDE OR DISCHARGE REVOKED.

**Cross-References.**—This section has been considered in appropriate places, *ante*.<sup>120</sup> It constitutes the single exception to the American doctrine that the cleavage day as to a bankrupt's property shall be the day the petition is filed by or against him. When a composition is set aside or a discharge revoked, property of the bankrupt which would otherwise be "after-acquired," vests in the trustee as of the date of the decree so setting aside or revoking. Thus far there are no cases construing this subsection.

<sup>117</sup>. See "Supplementary Forms," post.

<sup>118</sup>. For forms of notice and order of sale, see "Supplementary Forms," post.

<sup>119</sup>. § 15, Act of 1841, required the insertion in the deed of a copy of the

adjudication and order appointing trustee. The dates of these steps in the proceedings should be inserted now. Compare also § 47-c, added by the amendatory act of 1903.

<sup>120</sup>. See in Sections Thirteen and Fifteen.

# VI. Subs. e. TRANSFERS FRAUDULENT UNDER STATE LAWS MAY BE AVOIDED BY TRUSTEE.

**In General.**—This subsection has been referred to elsewhere.<sup>121</sup> It is the corollary of § 67-b, and means simply that if a creditor could have avoided any transfer (not merely a lien) under the laws of the State, the trustee can do the same,<sup>122</sup> and it is immaterial that the creditors of the bankrupt were not in a position to attack the transfer.<sup>122a</sup> The trustee is subrogated to the rights of creditors and may sue to avoid any conveyance which a creditor could have avoided, although made more than four months prior to the adjudication of bankruptcy.<sup>122b</sup> Such trustee may proceed for such purpose by bill in equity, and will not be required to seek his remedy at law.<sup>122c</sup> Such a suit may be maintained, although neither the trustee nor any creditor has reduced the claim against the bankrupt to a judgment.<sup>122d</sup> In many cases, the trustee will be able to sue under § 67-e or § 70-e. If under the latter, he must bring himself within the elements of pleading and proof recognized by the statutes and decisions of his State.<sup>123</sup> The important difference is that, if the suit is based on the state law, the state statute of limitation applies. Thus, many fraudulent transactions, which could not be brought under § 67-e, will be timely if resting on § 70-e. A mortgagee who knows that the mortgagor is selling mortgaged chattels for his own use, and who consents to his doing so, is not a *bona fide* holder and the mortgagor's trustee in bankruptcy may avoid the chattel mortgage, and recover the property transferred thereby, or its value.<sup>123a</sup> The cases turn on the law of the State and a summary of their doctrines would be useless; they are, therefore, merely cited in the foot-note.<sup>124</sup>

121. See in Sections Sixty and Sixty-seven. Compare also in this Section, sub nom., "Property Fraudulently Transferred."

122. *Mueller v. Bruss*, 8 Am. B. R. 442, 112 Wis. 406.

122a. *Sheldon v. Parker*, 11 Am. B. R. 152 (Neb. Sup.).

122b. *In re Mullen*, 4 Am. B. R. 224, 101 Fed. 413; *Lewis v. Bishop*, 47 App. Div. (N. Y.) 554, 62 N. Y. Supp. 618; *Beasley v. Coggins*, 12 Am. B. R. 355 (Fla. Sup. Ct.), 57 So. 213.

122c. *Wall v. Cox*, 4 Am. B. R. 659, 101 Fed. 403; *Beasley v. Cog-*

*gins*, 12 Am. B. R. 355 (Fla. Sup. Ct.), 57 So. 213.

122d. *Mueller v. Bruss*, 8 Am. B. R. 442, 112 Wis. 406; *Beasley v. Coggins*, 12 Am. B. R. 355 (Fla. Sup. Ct.), 57 So. 213.

123. *In re Gray*, 3 Am. B. R. 647; *Mueller v. Bruss*, *supra*; *Halbert v. Pranke*, 11 Am. B. R. 620 (Minn. Sup.).

123a. *Skillen v. Endelman*, 11 Am. B. R. 766, 39 Misc. 261, 79 N. Y. Supp. 413.

124. *In re Brown*, 1 Am. B. R. 107, 91 Fed. 358; *In re Grahs*, 1 Am.

**The Saving Clause.**—That clause in this subsection is similar to those found in § 67-e and § 67-f, and is for the same purpose. What has already been said of them will not be repeated here. This saving of the rights of *bona fide* holders for value is also merely expressive of the law.<sup>125</sup> But, after adjudication, the filing of the petition amounting to constructive notice, there can be no *bona fide* holder.<sup>126</sup>

**The Amendment of 1903.**—Here the words added are the same as those added to § 60-b and § 67-e.<sup>127</sup> Their purpose and effect have been considered in the discussion of those sections.<sup>128</sup> The effect of the omission from § 23-b of all reference to § 70-e has been questioned. It has been held, however, that such omission operates to bring actions under § 70-e within the general rule as laid down in § 23-b, and that while a bankruptcy court has general jurisdiction over the subject-matter it can only be exercised under the conditions imposed by § 23-b, that is, by the consent of the proposed defendants.<sup>128a</sup>

## VII. Subs. f. TITLE REVESTS IN BANKRUPT ON CONFIRMATION OF COMPOSITION.

**In General.**—This subsection has been considered in Section Twelve.

B. R. 465; *In re Phelps*, 3 Am. B. R. 396; *In re Mullen*, 4 Am. B. R. 224, 101 Fed. 413; *Mueller v. Bruss*, ante. Also many cases cited ante under Section Sixty-seven.

125. *In re Mullen*, ante.

126. *Harrell v. Beale*, 17 Wall. 590. Compare *In re Lake*, Fed. Cas. 7,992.

127. For the time when this amendment became operative, see "Supplementary Section to Amendatory Act," post.

128. See in Sections Sixty and Sixty-seven.

128a. *Gregory v. Atkinson*, 11 Am. B. R. 495, 127 Fed. 183.



## SECTION SEVENTY-ONE.

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### INDEXES AND SEARCHES OF CLERKS.

§ 71. *That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.\**

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**Analogous provisions:** See § 51.

**Cross references:** See § 51.

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### I. ADDITIONAL DUTIES OF CLERKS.

**In General.**—This section was added by the amendatory act of 1903. It was not in the bill as introduced, but was originally inserted by the Judiciary Committee of the House of Representatives. The only explanation of it is found in the Report<sup>1</sup> accompanying the bill. The Senate Judiciary Committee modified it, but not in

1. See House Report, No. 1,698, 57th Congress, First Session.

The last amendment is one generally demanded, and is in the interest of all persons who deal with property. It requires the clerks to prepare and keep indexes of all petitions and discharges in bankruptcy and to issue certificates in relation thereto when required. It also requires that

these be kept open to inspection and examination. It is frequently desirable to know whether a person has filed a petition in bankruptcy, and also whether he has been discharged, and it is many times impossible within a reasonable time to ascertain these facts in the absence of convenient indexes.

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\* This section is new and was added by the amendatory act of 1903.

any important particulars. Clearly the section should be a subdivision of § 51. Indeed, its necessity may be doubted. The chief purpose seems to be to require clerks to keep bankruptcy indices; this was already the practice in most of the districts. The provisions for certificates as to petitions and discharges seem to duplicate general provisions of law long enforced. The proviso clause is perhaps aimed at the practice of excluding the public from the clerk's files and records in vogue in some quarters. The provisions of the section are all new. They are carefully phrased, and do not require further comment. Under the rule phrased in § 19 of the amendatory act of 1903, this section affects only cases begun on or after February 5, 1903.

## SECTION SEVENTY-TWO.

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### LIMITATION ON FEES OF CERTAIN OFFICERS.

§ 72. *That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this Act.\**

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**Analogous provisions:** In U. S.: None.

In Eng.: None.

**Cross references:** To the law: §§ 14-b; 18; 40-a; 48-a; 59-a.

To the General Orders: XII (3), XXXV (2) (3).

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. Limitation on Referees' and Trustees' Fees.

Scope of Section.

Its Effect.

*Fees of Special Masters.*

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#### I. LIMITATION ON REFEREES' AND TRUSTEES' FEES.

**Scope of Section.**— This section was added by the amendatory bill of 1903. It originated in the Senate Judiciary Committee; and should be read in connection with §§ 40 and 48, and General Order XXXV (2) (3). It is a statutory ratification of the rule promulgated by the Supreme Court in the General Order just mentioned, which was perhaps too liberally interpreted in some districts and in others ran counter with antagonistic rules already in force at the time the Supreme Court orders became operative.

**Its Effect.**— The writer discusses this new section with considerable diffidence. It is perhaps sufficient to say that the purpose

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\* This section is new and was added by the amendatory act of 1903.

of the law-making power was to forestall any of those scandals due to the fee system for compensating the officers mentioned which first made the law of 1867 odorous and then pointed the way to its repeal. Under the present law, the practice had grown up, and even in certain districts been ratified by rules, of permitting the referee to charge for specified services, as, for instance, a small sum for mailing each notice or a *per diem* for hearings and continuances, in addition to the fees allowed by the law; while devices to increase the trustee's compensation, either through larger allowances to his attorney or by a *per diem* for extra work, as, for instance, in managing a going business, were often resorted to and have been frequently defended as essential to the proper administration of the law. Doubtless with knowledge of these practices, and surely of the reasons for them, the law-making power has both increased the compensation of these officers<sup>1</sup> and, to guard against similar local rules in the future, has, in this section, riveted the rule that the same shall be full compensation. Clearly, hereafter, neither a referee nor a trustee can receive any compensation as such, save that "expressly authorized and prescribed in this Act."

*Fees of Special Masters.*—Here the rule of *Fellows v. Freudenthal*<sup>2</sup> still pertains. References to the referee as such may, of course, be made under the authority of General Order XII (3). Such references are rare, for the reason that, the judicial service performed being by the statute limited to the judge, there is no provision for compensating the junior officer. References are, therefore, usually made, not under this order, but under the general power of the court to call to its assistance a master in chancery. While serving as such, the referee does not sit as referee, and would seem to have the same right to compensation as when appointed by the judge while sitting on any of the other sides of his court. The referee is in this simply an individual practitioner, who from experience and training is best qualified to pass on bankruptcy questions. The cases under the original law are, therefore, most of them still in point.<sup>3</sup>

1. See §§ 40 and 48, also § 2 (3), all as amended by the Act of 1903.

2. *Fellows v. Freudenthal*, 4 Am. B. R. 490, 102 Fed. 731.

3. *Fellows v. Freudenthal*, supra; *In re McDuff*, 4 Am. B. R. 110, 101

Fed. 241; *Bragassa v. St. Louis Cycle*, 5 Am. B. R. 700, 107 Fed. 77; *In re Grossman*, 6 Am. B. R. 510, 111 Fed. 507. See also *In re Todd*, 6 Am. B. R. 88, 109 Fed. 265.

## SUPPLEMENTARY SECTION TO ORIGINAL ACT.

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### THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.

**The Time When This Act Shall Go into Effect.**— *a* This act shall go into full force and effect upon its passage: Provided, however, That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

*b* Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

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**Analogous provisions:** In U. S.: Act of 1867, § 50; Act of 1841, § 17.

In Eng.: None.

**Cross references:** "Supplementary Section to Amendatory Act," *post*.

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### SYNOPSIS OF SECTION.

#### I. Subs. a. When the Act Went into Effect.

In General.

Its Constitutionality.

#### II. Subs. b. Effect of Bankruptcy Act on Proceedings Under State Insolvency Laws.

In General.

#### III. State Insolvency Laws; When Suspended.

In General.

*Illustrative Cases.*

#### IV. Constitutionality of Bankruptcy Law.

*Hanover Bank v. Moyses.*

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#### I. Subs. a. WHEN THE ACT WENT INTO EFFECT.

**In General.**— This subsection is different from the corresponding provisions of previous laws. The operation of each was post-

## Effect of Bankruptcy Law on State Insolvency Laws. [Act of 1898.]

poned to a day certain some time after the approval of the act. Not so of the present statute.<sup>1</sup> It went into full operation on July 1, 1898—which means the whole of that day<sup>2</sup>—save that no petitions could be filed until August 1, 1898, if voluntary; or until November 1, 1898, if involuntary. “Passage” here means the same as “approval.” Thus, the courts had power on July 1, 1898, to appoint referees and promulgate rules, and from and including that day all state insolvency laws were suspended.<sup>3</sup> It has even been held that the rights of creditors fixed by the law accrued on that day, the exercise of them only being suspended until a petition could be filed.<sup>4</sup> On the other hand, a state court sustained a demurrer to a bill in equity, the apparent purpose of which was to keep the debtor’s property intact until a bankruptcy petition could be filed.<sup>5</sup> The amendatory act went into effect February 5, 1903. Its effect on then pending proceedings is considered in the next Section.

## II. Subs. b. EFFECT OF BANKRUPTCY ACT ON PROCEEDINGS UNDER STATE INSOLVENCY LAWS.

**In General.**—This is not important now, more than four years having elapsed since the passage of the act. The subsection is expressive of the rule of law that state insolvency laws continue in full operation as to all cases begun thereunder before the bankruptcy law was approved.<sup>6</sup> But, though begun beforehand, if so long beforehand as to exclude the presumption that they are still pending,<sup>7</sup> the federal supersedes the state law. Illustrative cases under former laws will be found in the foot-note.<sup>8</sup>

1. For the reason, see cases like: *In re Horton*, Fed. Cas. 6,708; *Day v. Bardwell*, 97 Mass. 246, and *Judd v. Ives*, 4 Metc. 401, are no longer of value.

2. Compare *Leidigh Carriage Co. v. Stengel*, 2 Am. B. R. 383, 95 Fed. 637. And see *In re Tonawanda St. Pl. Mill*, 6 Am. B. R. 38.

3. *Palmer Mfg. Co. v. Hamilton*, 1 Am. B. R. 39; *In re Brusser Ritter Co.*, 1 Am. B. R. 58, 90 Fed. 651; *In re Etheridge Furniture Co.*, 1 Am. B. R. 112, 92 Fed. 329; *In re Curtis*, 1 Am. B. R. 440, 91 Fed. 737; *Littlefield v. Gray*, 8 Am. B. R. 409. Also cases cited in foot-note 13, post.

4. *Westcott v. Berry*, 4 Am. B. R. 264. Compare *Kosches v. Libowitz*, 4 Am. B. R. 265, in note; *Blake v. Valentine Co.*, 1 Am. B. R. 372, 89 Fed. 691.

5. *Ideal Clo. Co. v. Hazle*, 6 Am. B. R. 265. See also *Ellis v. Hays, etc., Co.*, 8 Am. B. R. 109.

6. Compare *In re Mussey*, 3 Am. B. R. 592, 99 Fed. 71.

7. *In re Bates*, 4 Am. B. R. 56, 100 Fed. 263.

8. *In re Holmes*, Fed. Cas. 6,633; *Lavender v. Gosnell*, 43 Md. 153; *Longis v. Creditors*, 20 La. Ann. 15.

## III. STATE INSOLVENCY LAWS; WHEN SUSPENDED.

**In General.**— No bankruptcy law since that of 1800 has contained any provision declaring the effect of such a law on analogous state laws. That law, § 61, provided as follows:

This act shall not repeal or annul, or be construed to repeal or annul, the laws of any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may affect persons who are or may be within the purview of this act.

So far as it goes, the clause quoted is doubtless still the law. There was no need to insert it in subsequent statutes, for ere the act of 1841 was passed, the Supreme Court had delivered two epoch-making decisions, which settled the law on the subject: (1) that, when Congress has exercised its constitutional power to enact a uniform bankruptcy law, all existing state insolvency laws applying to the same persons are suspended,<sup>9</sup> but (2) that, this power not being exclusive, state laws are valid and continue operative so far as they do not conflict with the paramount federal law.<sup>10</sup> Since that time, the books have been filled with cases, yet few of them add much to *Sturges v. Crowningshield* and *Ogden v. Saunders*. The reported cases prior to the former law are not altogether uniform or always reconcilable;<sup>11</sup> the same is true of those under the latter law.<sup>12</sup> Indeed, the impossibility of phrasing rules always applicable is apparent. Some of those most generally recognized are stated in the next paragraph.

**Illustrative Cases.**— Laws regulating general assignments,<sup>13</sup> not being insolvency laws, are not suspended. Likewise as to laws

9. *Sturges v. Crowningshield*, 4 Wheat. 122.

10. *Ogden v. Saunders*, 12 Wheat. 213; *Singer v. National Bedstead Mfg. Co.*, 11 Am. B. R. 276 (N. J. Ch.).

11. *Shryock v. Bashore*, 13 N. B. R. 481. See also *Collier on Bankruptcy*, 1st ed., p. 427.

12. That state laws are suspended: *In re Smith*, 2 Am. B. R. 9, 92 Fed. 135; *Ketchum v. McNamara*, 6 Am. B. R. 160; *In re Macon Sash & Door Co.*, 7 Am. B. R. 66, modified on appeal as *Carling v. Seymour Lumber*

*Co.*, 8 Am. B. R. 29, 113 Fed. 483; *Scheuer v. Book, etc., Co.*, 7 Am. B. R. 384, 112 Fed. 407; note also *In re Storck Lumber Co.*, 8 Am. B. R. 86, 114 Fed. 360; *In re Hall Co.*, 10 Am. B. R. 88; *In re Sievers*, 1 Am. B. R. 117, 91 Fed. 366; affirmed as *Davis v. Bohle*, 1 Am. B. R. 412, 92 Fed. 325; also cases cited in footnotes 3 and 4. That state laws are not suspended: *In re Scholtz*, 5 Am. B. R. 782, 106 Fed. 831.

13. *In re Sievers*, *supra*; *Duryea v. Guthrie*, 11 Am. B. R. 234 (Wis.). Contra, *In re Smith*, 2 Am. B. R. 9,

concerning the punishment of fraudulent debtors,<sup>14</sup> or for the settlement of the estates of deceased insolvents.<sup>15</sup> State laws may be suspended in part only, as where they refer to a class expressly excepted by the bankruptcy law, in which case they continue operative as to that class.<sup>16</sup> Thus a state law under which persons engaged chiefly in the tillage of the soil may be proceeded against by their creditors for the purpose of throwing them into bankruptcy has been held not to be superseded by the bankrupt act.<sup>16a</sup> Nor does the existence of a federal law preclude the passage of a state insolvency law; the latter merely remains inoperative while the former is in force.<sup>17</sup> A state statute relating to insolvency and providing for proceedings having the same object as the bankrupt act is absolutely inoperative as to the persons and property to which the bankrupt act applies.<sup>17a</sup> The discharge feature seems not necessarily a part of an insolvency law, and state laws lacking it have been held suspended by a national bankruptcy law.<sup>18</sup> As to the effect of the latter on a state law regulating the distribution of the assets of insolvent corporations there is much conflict. The weight of authority under the act of 1867 was that they were suspended.<sup>19</sup> It would seem that, if the proceeding be purely one of distribution and the corporation be amenable to bankruptcy under § 4 of the present law, the state law would be suspended; otherwise, not.<sup>20</sup> As stated by Chief Justice Fuller: "The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal

92 Fed. 135. But see *Mayer v. Hellman*, 91 U. S. 496. And compare *Thrasher v. Bentley*, 1 Abb. N. C. (N. Y.) 39, and *Beck v. Parker*, 65 Pa. St. 262.

14. *Berthelon v. Betts*, 4 Hill (N. Y.), 577; *Scully v. Kirkpatrick*, 79 Pa. St. 324.

15. *Hawkins v. Larned*, 54 N. H. 333.

16. *Herron Co. v. Superior Court*, 8 Am. B. R. 492; *Maltbie v. Hotchkiss*, 38 Conn. 80. Compare *Fisk v. Montgomery*, 21 La. Ann. 446.

16a. *Old Town Bank v. McCormick*, 10 Am. B. R. 767, 96 Md. 341.

17. *Palmer v. Hixon*, 74 Me. 447.

17a. *Potts v. Smith Mfg. Co.*, 25

Pa. Super. Ct. 206, 12 Am. B. R. 392, in which case it was also held that since the Constitution has left in the States and in Congress concurrent power over bankruptcy, the exercise of such power by Congress precludes legislation by a State over the subject.

18. *In re Smith*, 2 Am. B. R. 9, 92 Fed. 135; *Boese v. Locke*, 17 Hun (N. Y.), 270.

19. *Shryock v. Bashore*, ante; *Thornhill v. Bank*, Fed. Cas. 13,992; *Platt v. Archer*, Fed. Cas. 11,213. Contra, *Chandler v. Siddle*, Fed. Cas. 2,594.

20. See *Platt v. Archer*, supra; also cases cited ante in this Section.



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 Act of 1898.]      Constitutionality of Bankruptcy Law.
 

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courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."<sup>20a</sup> The practitioner will do well to measure his facts by the rule of *Sturges v. Crowningshield*.<sup>21</sup>

#### IV. CONSTITUTIONALITY OF BANKRUPTCY LAW.

**Hanover Bank v. Moyses.**— This case<sup>22</sup> is the latest of a chain of decisions by the Supreme Court, sustaining the constitutionality of our bankruptcy laws. It adds little to *Sturges v. Crowningshield*. Chief Justice Marshall here, as always, said the final word.

<sup>20a</sup> In re Watts, 190 U. S. 1, 10 Am. B. R. 113. See also Matter of Milbury Co., 11 Am. B. R. 523; Merry v. Jones, 11 Am. B. R. 625 (Ga. Sup.); In re White Mountain Paper Co., 11 Am. B. R. 491, 127 Fed. 180.

Storey, Fed. Cas. 66; Ex parte Eames, Fed. Cas. 4,237; Appeal of Gerry, 43 Conn. 289; Griswold v. Pratt, 50 Mass. 16; Steelman v. Matix, 36 N. J. L. 344.

<sup>21</sup> The following are suggestive cases on this subject: Adams v.

<sup>22</sup> Hanover Bank v. Moyses, 186 U. S. 181, 8 Am. B. R. 1.

## SUPPLEMENTARY SECTION TO AMENDATORY ACT.

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### THE TIME WHEN THE AMENDATORY ACT TOOK EFFECT.

(§ 19 of *Amendatory Act of 1903*).— *That the provisions of this amendatory Act shall not apply to bankruptcy cases pending when this Act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said Act of July first, eighteen hundred and ninety-eight.\**

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**Analogous provisions:** In U. S.: Act of July 27, 1868; Act of July 14, 1870; Act of June 8, 1872; Act of March 3, 1873; Act of June 22, 1874; Act of February 6, 1875; Act of July 26, 1876; Act of August 15, 1876.

In Eng.: Act of 1890, § 30.

**Cross references:** To the law: §§ 2 (5); 3-a (4); 4-b; 14-b (3) (4) (5) (6); 17-a; 18-a-b; 21-a; 23-b; 40-a; 47-c; 48-a; 57-g; 60-a-b; 64-b (2); 65-b; 67-c; 70-e; 71; 72.

To the General Orders: None.

To the Forms: None.

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### SYNOPSIS OF SECTION.

#### I. When Amendatory Act Took Effect.

##### Comparative Legislation.

*Amendments of 1874.*

##### The Present Rule.

*Effect on the Forum of Suits where the Cause of Action Antedates the Proceeding in Bankruptcy.*

*Effect on the New Act of Bankruptcy.*

*Effect on Transactions within the New Objections to a Discharge.*

*Effect on Dischargeability of Debts.*

*Effect on Preferences.*

*Effect is but Temporary.*

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\*This was § 19 of the amendatory act of 1903. That act was approved by the President at 4:30 P. M., on February 5, 1903.

## I. WHEN AMENDATORY ACT TOOK EFFECT.

**Comparative Legislation.**—Section Nineteen of the amendatory act of 1903 was added to the Ray bill by the Senate Judiciary Committee. Its purpose is manifestly to clear up the unsettled questions growing out of the numerous amendments to the law of 1867. That statute was amended several times even prior to the important act of June 22, 1874, subsequently discussed and by several minor acts referred to in the "Analogous Provisions," *supra*.<sup>1</sup> These amendatory acts, especially that of 1874, affected substantial rights and remedies, and the cases construing them were numerous and not altogether harmonious.<sup>2</sup> No case reached the Supreme Court, and, when the law of 1867 was repealed, many mooted questions were undetermined. The English amendatory act of 1890<sup>3</sup> by its terms did not go into effect for more than four months after its passage, and few of the problems which have troubled our courts arose there.

*Amendments of 1874.*—The act of 1874 was a partial revision of the original law of 1867. It had no general clause like § 19 of the amendatory act of 1903. But its section changing the conditions on which a discharge would be granted<sup>4</sup> being silent as to time, was held to apply to all pending cases;<sup>5</sup> another section,<sup>6</sup> modifying the original law as to voidable transactions and whose operation was postponed until the running of the respective periods of interdiction, was held wholly prospective;<sup>7</sup> while still another section,<sup>8</sup> changing certain requirements as to the number and amount of creditors who could initiate an involuntary proceeding, was given retrospective effect to all proceedings begun after December 1, 1873.<sup>9</sup> These

1. For cases considering some of these amendments, see *In re Wyllie*, Fed. Cas. 18,112. Compare also *In re Kean*, Fed. Cas. 7,630; *In re Everitt*, Fed. Cas. 4,579; *In re Smith*, Fed. Cas. 12,986; *In re Billing*, Fed. Cas. 1,408.

2. For instance, compare *In re King*, Fed. Cas. 7,781, with *In re Lee*, Fed. Cas. 8,179.

3. § 30.

4. § 9, Act of June 22, 1874.

5. *In re King*, *supra*; *In re Griffiths*, Fed. Cas. 5,825; *In re Francke*,

Fed. Cas. 5,046. See *contra*, *In re Perkins*, Fed. Cas. 10,983. Consult also *In re Lowenstein*, Fed. Cas. 8,573.

6. § 10, Act of June 22, 1874.

7. *Bradbury v. Galloway*, Fed. Cas. 1,764; *Singer v. Sloan*, Fed. Cas. 12,899.

8. § 12, Act of June 22, 1874.

9. *Brooke v. McCracken*, Fed. Cas. 1,932; *Bradbury v. Galloway*, *supra*; *Hamlin v. Pettibone*, Fed. Cas. 5,995; *Tinker v. Van Dyke*, Fed. Cas. 14,058.

variances make the cases decided under that amendatory statute confusing and, it is thought, often unsafe guides. They seem to warrant, however, the following summary of rules applicable to the present amended law: (1) Where an amendatory statute is silent as to the time of its operation, it takes effect on its approval; (2) consequently, if silent, it, generally speaking, affects all pending proceedings; (3) this is peculiarly so if the amendment is remedial only; (4) but it is not so, even if made so by words, where the amendment will change rights, as distinguished from remedies, which were vested or adjudicated prior to the amendatory act. Cases in point, not already cited, will be found in the foot-note.<sup>10</sup>

**The Present Rule.**—In the present § 19, Congress declares a broad rule, and attempts thereby to establish a uniform day of cleavage. The amendments apply to all bankruptcy cases begun after the act took effect; and do not apply to those begun before.<sup>10a</sup> Thus, it seems certain that in all administrative matters, as those specified in §§ 2 (5), 4-b, 18-a-b, 21-a, 40-a, 47-c, 48-a, 64-b (2) and 65-b, as amended, and the new §§ 71 and 72, the amendatory act will not apply unless the proceeding in which it is asserted was begun on or after February 5, 1903.<sup>11</sup> But the words of the statute, "bankruptcy cases" have a limited meaning, which is probably the same as "proceedings in bankruptcy,"<sup>12</sup> and questions will quickly arise in such proceedings where the rule phrased into the statute will not apparently apply. In such cases there will be that silence as to time already referred to and the rules already stated will be applicable. It has been held that the provisions of § 19 apply to bankruptcy cases proper, and not to a suit in equity to recover a prohibited preference, brought by a trustee who was elected before the amendment of 1903 took effect, so that if such suit was brought subsequent to the passage of the amendatory act, the question of jurisdiction must be determined by the act as amended.<sup>12a</sup>

10. In *re Taylor*, Fed. Cas. 13,776; In *re Leland*, Fed. Cas. 8,231; In *re Obear*, Fed. Cas. 10,395; In *re Pickering*, Fed. Cas. 11,120; In *re King*, Fed. Cas. 7,782; In *re Angell*, Fed. Cas. 386; In *re Burch*, Fed. Cas. 2,138; In *re Oregon, etc., Co.*, Fed. Cas. 10,561; *Oxford Iron Co. v. Shafter*, Fed. Cas. 10,637; In *re Wylie*, ante.

10a. In *re Docker-Foster Co.*, 10 Am. B. R. 584, 123 Fed. 190.

11. Even if before 4:30 o'clock p. m. on that day. In *re Carrier*, Fed. Cas. 2,443; In *re Williams*, Fed. Cas. 17,700.

12. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163.

12a. *Pond v. New York Exchange Bank*, 10 Am. B. R. 343, 124 Fed. 992. Compare In *re Hartman*, 10 Am. B. R. 387, 121 Fed. 940, in which it was held that the amendment of section

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 Act of 1903.]      Effect on the New Act of Bankruptcy.
 

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*Effect on the Forum of Suits Where the Cause of Action Antedates the Proceeding in Bankruptcy.*—Here the amendments to §§ 23-b, 60-a-b, 67-e, and 70-e are involved. The amendatory act makes no change in the legal quality of the cause of action save in that mentioned in § 60-b, subsequently considered. In effect, then, the changes deal only with the court in which suits by the trustee may be brought. The amendments are, therefore, purely remedial,<sup>13</sup> and though such suits are strictly not “proceedings in bankruptcy,” they may, even though brought by trustees appointed in pending cases, be laid, at his option, in the federal district or the proper state court.

*Effect on the New Act of Bankruptcy.*—Here the rule is probably the same, though the question is not free from doubt. It will be important only in receiverships within the four months prior to February 5, 1903. Under the broad rule phrased into the amendatory bill, the proceeding necessarily post-dates the taking effect of the act, and the amendment to § 3-a (4) would seem immediately available, even though at the time of the commission of the act thus relied on, the latter was not *eo nomine* an act of bankruptcy. Further, the broad rule is not limited, as it was in an amendment of similar effect made by the amendatory act of June 22, 1874.<sup>14</sup> In a sense, rights—that is, those of the receiver and his attorney and perhaps of non-resident creditors<sup>15</sup> (since a corporation cannot go into voluntary bankruptcy)—are affected. Yet, in a broader sense, the amendment of § 3-a (4) goes merely to the remedy. Besides, as previously suggested,<sup>16</sup> it is very probable that the new act of bankruptcy was within the meaning of § 3-a (1). If so, there can be no doubt. At any rate, since the declaration of the intention of Congress, found in the amended § 3-a (4), the practitioner who alleges a receivership to be an act of bankruptcy under each subdivision, *i. e.*, § 3-a (1) and § 3-a (4), will be in little danger of dismissal, even if the receivership began within the four months antedating February 5, 1903.

23b giving the bankruptcy court jurisdiction of suits for the recovery of property under §§ 60b and 67e, is confined to cases in which the original petition in bankruptcy was filed after the amendatory act took effect.

13. See cases previously cited.

Compare also *Hutchins v. Taylor*, Fed. Cas. 6953.

14. § 10, Act of June 22, 1874.

15. See discussion in *In re Empire, etc., Co.*, 1 Am. B. R. 136.

16. See p. 44, ante.

*Effect on Transactions Within the New Objections to a Discharge.*

— Discharge proceedings are a part of the “proceedings in bankruptcy.” Hence, where the bankruptcy petition was filed before February 5, 1903, under the rule stated in § 19 of the amendatory act, the new grounds for refusing a discharge are not available.<sup>16a</sup> Where it is filed after that date, and any objection available under the amendatory act rests on a transaction before February 5, 1903, the applicability of the rule is at best in doubt. The cases under the law of 1867 are not wholly in point;<sup>17</sup> the change in that statute had to do with the assent of creditors and the *pro rata* to be paid — both, it is true, conditions precedent to a discharge, but quite different from the present changes which create objections due to the acts or omissions of the bankrupt, not of his creditors, now for the first time available to the latter. The cases, however, are in point so far as they hold the discharge features of a bankruptcy law remedial rather than as creating rights. The omission of any words giving the changes here a prospective effect is also significant. On the other hand, it is a settled principle that transactions made objections to a discharge, which took place prior to the passage of a bankruptcy law making them such, are not available as objections.<sup>18</sup> Further, discharge proceedings have many of the elements of criminal trials,<sup>19</sup> and the courts have always been tender of the rights of the bankrupt. Thus, it will be urged, if the broad rule is to apply, he may lose his discharge because of acts prior to the amendatory bill, the effect of which on a subsequent bankruptcy neither he nor his creditors could know. Further, the period affected is not one of months, but may stretch over years. That he ought to lose his discharge, provided his conduct brings him within subdivision (3), subdivision (4), or subdivision (5) of § 14-b as amended, is not doubted. But the question will probably not be settled until it reaches the higher courts.

*Effect on Dischargeability of Debts.*— The change made in § 17-a is not of such a character as to promise much difference of opinion. To be dischargeable, the debt must be provable.<sup>20</sup> It can be provable only in a specified proceeding. If that proceeding is begun after

<sup>16a</sup>. In re Dauchy, 10 Am. B. R. 527, 122 Fed. 688; In re Carlston, 12 Am. B. R. 475, 131 Fed. 146.

<sup>17</sup>. See cases in foot-note 5, ante.

<sup>18</sup>. In re Moore, Fed. Cas. 9,751;

In re Hollenschade, Fed. Cas. 6,610; In re Delevan, Fed. Cas. 3,758.

<sup>19</sup>. See pp. 170-175, ante.

<sup>20</sup>. § 63.

Act of 1903.]

Effect on Preferences.

February 5, 1903, the words of the amended section fix the test; if before, the words of the section in the original law control.

*Effect on Preferences.*—It follows from what has gone before that § 57-g, being one of administration only, the new rule, *i. e.*, the reverse of *Pirie v. Chicago, etc., Co.*,<sup>21</sup> will apply to all cases begun on or after February 5, 1903.<sup>21a</sup> The changes in § 60-a-b are largely those of transposition only. As to the ultimate decision, when the new element of record notice is an essential part of the cause of action, *quære?* Here the legal quality of the act is changed, and an exception to the broad rule previously urged, may be the result. Some of the analogous cases under the former law will be found in the foot-note.<sup>22</sup>

*Effect is but Temporary.*—As soon as the amendatory act shall be four months old, none of the questions discussed in the previous paragraphs of this Section, other than those concerning objections to discharge, will be of importance. Meanwhile, the words of § 19 of the amendatory act will determine most questions. Such seems the intention of Congress. He who asserts the exception will assume a heavy burden. The rule, rather than the exception, will usually control.

21. 182 U. S. 438, 4 Am. B. R. 814.

1,650; *Bradbury v. Galloway*, ante;

21a. In re *Docker-Foster Co.*, 10

In re *Lee*, ante; *Barnewall v. Jones*,

Am. B. R. 584, 123 Fed. 190.

Fed. Cas. 1,027; *Thomas v. Wood-*

22. *Boothe v. Brooks*, Fed. Cas.

*bury*, Fed. Cas. 13,916.





# PREFATORY NOTE

TO

## ANNOTATED EDITION OF THE GENERAL ORDERS AND FORMS IN BANKRUPTCY.

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The General Orders and Forms, prescribed by the Supreme Court at the October Term of 1898, are discussed in the appropriate places, *ante*. The annotations consist, therefore, only in cross-references; for instance, the general orders to the forms, and *vice versa*, with, as a rule, references to the law by section numbers, to the Sections of the text, to the Equity Rules, where pertinent, and to some of the more valuable cases. To the official forms have also been added a number of others, under the head "Supplementary Forms," many of them entirely new, others adaptations from those prescribed by local rules in different parts of the country, and still others, the use of which, instead of the official forms, is suggested. In preparing these forms, the author has selected such as are constantly in demand by practitioners in bankruptcy.

For convenience of reference the general orders and forms have been indexed with the supplementary forms, thus outlining, it is hoped, a system of practice in bankruptcy both reasonably complete and easily available.

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# GENERAL ORDERS IN BANKRUPTCY

ADOPTED BY THE

## SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1898.

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### PREAMBLE.\*

In pursuance of the powers conferred by the Constitution and laws upon the Supreme Court of the United States, and particularly by the act of Congress approved July 1, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States, it is ordered, on this 28th day of November, 1898, that the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January, 1899. And it is further ordered that all proceedings in bankruptcy had before that day, in accordance with the act last aforesaid, and being in substantial conformity either with the provisions of these general orders, or else with the general orders established by this court under the bankrupt act of 1867 and with any general rules or special orders of the courts in bankruptcy, stand good, subject, however, to such further regulation by rule or order of those courts as may be necessary or proper to carry into force and effect the bankrupt act of 1898 and the general orders of this court.

[These General Orders are fully discussed in appropriate places in the text, which may be found by reference to the General Index, *post*. For elaborate note on the effect and scope of these General Orders, see Collier on Bankruptcy, 3d ed., pp. 481-484.]

\* **Cross references:** To the law: § 30.

To the General Orders: XXXVII, XXXVIII.

To the Official Forms: None.

To the Supplementary Forms: None.

To the Equity Rules: LXXXIX, XC. (See also Revised Statutes, §§ 913, 914.)

Illustrative Cases: See those cited under Section Thirty of this work.

### I. DOCKET.\*

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon, of the reference of the case to the referee, and of the transmission by him to the clerk of his certified record of the proceedings, with the dates thereof, and a memorandum of all proceedings in the case except those duly entered on the referee's certified record aforesaid. The docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection.

[Latter part of General Order I, 1867, with changes specifying more fully the entries to be made in the docket.]

**\* Cross references:** *To the law:* *As to commencement of proceedings,* § 1 (10); *As to duties of the clerk,* §§ 51, 71; *As to duties of the referee,* §§ 29-c, 39-a (7), 42; *As to duties of the trustee,* §§ 29-c, 49.

**To the General Orders:** II, IV.

**To the Official Forms:** None.

**To the Supplementary Forms:** None.

**To the Equity Rules:** I-VI, inclusive.

**Illustrative Cases:** None.

### II. FILING OF PAPERS.\*

The clerk or the referee shall indorse on each paper filed with him the day and hour of filing, and a brief statement of its character.

[Part of General Order I, 1867, but not so full.]

**\* Cross references:** *To the law:* §§ 18-a, 59-a-b.

**To the General Orders:** VI, IX, XX.

**To the Official Forms:** None, both the clerk and the referee usually have filing stamps.

**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** None.

### III. PROCESS.\*

All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerk; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees.

[General Order II, 1867, except the word "referees" is substituted herein for the word "registers."]

**\* Cross references:** **To the law:** *As to process in involuntary proceedings, § 18-a (and also under §§ 4 and 5); As to process to witnesses, § 21-a.*

**To the General Orders:** VIII.

**To the Official Forms:** Nos. 5, 30.

**To the Supplementary Forms:** None.

**To the Equity Rules:** VII to XVI, inclusive.

**Illustrative Cases:** See those cited under Sections Eighteen and Twenty-one of this work.

### IV. CONDUCT OF PROCEEDINGS.\*

Proceedings in bankruptcy may be conducted by the bankrupt in person in his own behalf, or by a petitioning or opposing creditor; but a creditor will only be allowed to manage before the court his individual interest. Every party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers or proceedings offered by an attorney to be filed shall be indorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney.

[General Order III, 1867, without substantial change, except that the old rule required the entry of the attorney's place of residence as well as his place of business.]

**\* Cross references:** **To the law:** *As to who may file voluntary petitions, §§ 4-a, 59-a; As to who may file involuntary petitions, § 59-b; As to partnership petitions, § 5; As to petitions against corporations,*

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Frame of Petitions; Petitions in Different Districts. [IV, VI.]

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§ 4-b; *As to where petitions must be filed*, § 2 (1); *As to appearances*, §§ 18-b, 59-f; *As to answer and other pleas*, §§ 18-d, 59; *As to notices*, § 58.

**To the General Orders:** VI, VIII, IX, XXIII.

**To the Official Forms:** Generally.

**To the Supplementary Forms:** For those in involuntary cases, Nos. 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156; for appearances, Nos. 128, 138, 146, 147. See also generally "Supplementary Forms," *post*.

**To the Equity Rules:** IV, XVII, and, as to pleadings, generally.

**Illustrative Cases:** Generally to cases cited, in Sections Four, Five, Eighteen, Fifty-eight and Fifty-nine of this work.

## V. FRAME OF PETITIONS.\*

All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference.

[First part of General Order XIV, 1867, without change.]

\* **Cross references:** **To the law:** *As to petitions*, § 18-a-c; *As to schedules*, § 7 (8); *As to referee's duty to examine schedules, etc.*, § 39-a (2); *As to referee's duty to prepare schedules in certain cases*, § 39-a (6).

**To the General Orders:** IX, XI.

**To the Official Forms:** Nos. 1, 2, 3, with the Schedules.

**To the Supplementary Forms:** Nos. 143, 144.

**To the Equity Rules:** XX to XXV.

**Illustrative Cases:** *Mahoney v. Ward*, 5 Am. B. R. 770, 100 Fed. 278; *Liesum v. Krauss*, 35 Misc. (N. Y.) 376; *Sutherland v. Lasher*, 11 Am. B. R. 780. Compare *Anon.*, Fed. Cas. 459; *In re Orne*, Fed. Cas. 10,582. See also, generally, under Section Eighteen of this work.

## VI. PETITIONS IN DIFFERENT DISTRICTS.\*

In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier

## VI.]

## Petitions in Different Districts.

act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and, in either case, the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions shall be filed in different districts by different members of the same partnership for an adjudication of the bankruptcy of said partnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed. But the court so retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest that another of said courts should proceed with the cases, order them to be transferred to that court.

[General Order XVI, 1867, without change, except that the last sentence of Rule VI under consideration, is new.]

**\* Cross references:** *To the law:* *As to where petitions may be filed,* § 1 (2); *As to partnership petitions,* § 5; *As to transfer of cases,* §§ 2 (19), 32; *Also generally to* §§ 2 (19), 18.

**To the General Orders:** IV, VII, VIII.

**To the Official Forms:** None.

**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** *In re Strait*, 2 Am. B. R. 308; *In re Waxelbaum*, 3 Am. B. R. 392, 98 Fed. 589; *In re Elmira Steel Co.*, 5 Am. B. R. 484; *In re Sears*, 7 Am. B. R. 279, 112 Fed. 58; *Bradley Timber Co. v. White*, 10 Am. B. R. 329, 121 Fed. 779. See also, generally, cases cited under Sections Four and Thirty-two of this work.

**VII. PRIORITY OF PETITIONS.\***

Whenever two or more petitions shall be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor on different days within four months prior to the filing of said petitions, and the debtor shall appear and show cause against an adjudication of bankruptcy against him on the petitions, that petition shall be first heard and tried which alleges the commission of the earliest act of bankruptcy; and in case the several acts of bankruptcy are alleged in the different petitions to have been committed on the same day, the court before which the same are pending may order them to be consolidated, and proceed to a hearing as upon one petition; and if an adjudication of bankruptcy be made upon either petition, or for the commission of a single act of bankruptcy, it shall not be necessary to proceed to a hearing upon the remaining petitions, unless proceedings be taken by the debtor for the purpose of causing such adjudication to be annulled or vacated.

[General Order XV, 1867, without change other than that "four months" appears in the new rule in place of "six months."]

\* **Cross reference:** See those to General Order VI, immediately *ante*.

**VIII. PROCEEDINGS IN PARTNERSHIP CASES.\***

Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required



## IX, X.]      Schedule in Involuntary Bankruptcy; Indemnity.

by the act in cases of debtors against whom adjudication of bankruptcy shall be made.

[General Order XVIII, 1867, with no substantial change.]

**\* Cross references: To the law:** §§ 5, 18.

**To the General Orders:** VI, VII.

**To the Official Forms:** Nos. 2, 30.

**To the Supplementary Forms:** No. 143.

**To the Equity Rules:** None.

**Illustrative Cases:** In re Freund, 1 Am. B. R. 25; In re Murray, 3 Am. B. R. 601, 96 Fed. 600; In re Carleton, 8 Am. B. R. 270, 115 Fed. 246. See also generally cases cited in Section Five of this work.

## IX. SCHEDULE IN INVOLUNTARY BANKRUPTCY.\*

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor to file, within five days after the date of the adjudication, a schedule giving the names and places of residence of all the creditors of the bankrupt, according to the best information of the petitioning creditor. If the debtor is found, and is served with notice to furnish a schedule of his creditors and fails to do so, the petitioning creditor may apply for an attachment against the debtor, or may himself furnish such schedule as aforesaid.

[This General Order is new.]

**\* Cross references: To the law:** *As to bankrupt's duty to file schedules,* § 7 (8); *As to referee's,* § 39-a (6).

**To the General Orders:** V.

**To the Official Forms:** No. 1, with the Schedules.

**To the Supplementary Forms:** No. 116; and by analogy, No. 143.

**Illustrative Cases:** See cases cited in Sections Seven and Eighteen of this work.

## X. INDEMNITY FOR EXPENSES.\*

Before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to

be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering the same.

[This General Order is new.]

**\* Cross references:** *To the law:* *As to publishing and mailing notices,* § 58; *As to examinations of the bankrupt or others,* §§ 7 (9), 21-a; *As to marshal's expenses,* § 52; *As to clerk's expenses,* §§ 24, 25, 52, 71; *In general,* §§ 62, 64-b (3).

**To the General Orders:** IX, XII, XXII, XXVI, XXXV.

**To the Official Forms:** None.

**To the Supplementary Forms:** By analogy, No. 173.

**To the Equity Rules:** None.

**Illustrative Cases:** *In re Matthews,* 3 Am. B. R. 265, 97 Fed. 772; *In re Burke,* 6 Am. B. R. 502; *In re Sanborn,* 12 Am. B. R. 131, 131 Fed. 397.

## XI. AMENDMENTS.\*

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed.

[The last sentence is new. The rest of the General Order is substantially the same as a part of General Order XIV, 1867.]

**\* Cross references:** *To the law:* §§ 2 (6) (15); § 39-a (2).

**To the General Orders:** None.

**To the Official Forms:** None.

**To the Supplementary Forms:** Nos. 113, 114, 115.

**To the Equity Rules:** XXVIII to XXX.

**Illustrative Cases:** *In re Stevenson,* 2 Am. B. R. 66, 94 Fed. 110; *In re Bellah,* 8 Am. B. R. 310, 116 Fed. 49; and generally, *as to amendment of petitions,* in Section Eighteen; *As to amendment to schedules,* in Section Seven; *and as to intervention by other creditors,* in Section Fifty-nine, all *ante*.

## XII.]

## Duties of Referee.

**XII. DUTIES OF REFEREE.\***

1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge, or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

3. Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.

[Paragraph 1, except the last sentence, is the second paragraph of General Order IV, 1867, with slight changes. Paragraph 2 is derived from General Order V, 1867. Paragraph 3 is new; its validity as a limitation on the power of the referee to grant stays is doubted (see p. 25), especially where the district judge has conferred such power on the referee by § 38-a (4).]

**\* Cross references:** *To the law:* As to general jurisdiction and powers of referee, §§ 38, 39; As to orders of reference, §§ 18-f-g, 22; As to time and place when duties of referee will be performed, § 55; As to limitations on powers of referee, §§ 12-d, 14-b, 38-a (4), 39-b; As to allowance of claims, § 57; As to bankrupt's subjection to orders of court, § 7 (2); As to orders of protection, § 9-a.

**To the General Orders:** IX, XI, XVI, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXIX, XXX, XXXIII, XXXV.

**To the Official Forms:** Nos. 14, 15.

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Trustee; Appointment and Removal; No Official. [XIII, XIV.]

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**To the Supplementary Forms:** Generally.

**To the Equity Rules:** As to reference to Special Masters, LXXIII to LXXXIV.

**Illustrative Cases:** *National Bank v. Katz*, 1 Am. B. R. 19; *In re Huddleston*, 1 Am. B. R. 572; *In re McDuff*, 4 Am. B. R. 110; *In re Florcken*, 5 Am. B. R. 802, 107 Fed. 241; *In re Scott*, 7 Am. B. R. 35; *In re Rauchenplat*, 9 Am. B. R. 763; *generally for duties of referees, as such, after reference*, under Sections Two, Nine, Eighteen, Thirty-eight, Thirty-nine, Fifty-five, and Fifty-seven of this work; *and for the duties and compensation of special masters*, under Sections Twelve, Fourteen, Eighteen, and Seventy-two.

### XIII. APPOINTMENT AND REMOVAL OF TRUSTEE.\*

The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge; and he shall be removable by the judge only.

[As a rule of bankruptcy, this General Order is new; but the former bankruptcy law itself contained similar provisions as to the approval of the choice of a trustee; (Act of 1867, § 13, R. S., § 5034). Under that act a trustee could be removed not only by order of the court, but in some cases by a vote of the creditors with the approval of the court; (Act of 1867, § 18, R. S., § 5039).]

**\* Cross references:** **To the law:** *As to appointment of trustees*, §§ 2 (17), 44, 45, 56; *As to removal of trustees*, § 46.

**To the General Orders:** XIV, XV, XVI, XVII, XXV.

**To the Official Forms:** Nos. 22, 23, 24, 27, 52, 53, 54, 55.

**To the Supplementary Forms:** No. 164.

**To the Equity Rules:** None.

**Illustrative Cases:** *Falter v. Reinhard*, 4 Am. B. R. 782, 104 Fed. 292; *In re Henschel*, 6 Am. B. R. 25; s. c., in higher courts, 6 Am. B. R. 305, 109 Fed. 861, 7 Am. B. R. 662, 113 Fed. 443; *In re Machin*, 11 Am. B. R. 449. See also cases cited, and discussion of this General Order, in Section Forty-four of this work.

### XIV. NO OFFICIAL OR GENERAL TRUSTEE.\*

No official trustee shall be appointed by the court, nor any general trustee to act in classes of cases.

[Part of General Order IX, as amended in 1874, without substantial change.]

**\* Cross references:** None.

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XV, XVI.] No Trustee in Certain Cases; Notice of Appointment.

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**XV. TRUSTEE NOT APPOINTED IN CERTAIN CASES.\***

If the schedule of a voluntary bankrupt discloses no assets, and if no creditor appears at the first meeting, the court may, by order setting out the facts, direct that no trustee be appointed; but at any time thereafter a trustee may be appointed, if the court shall deem it desirable. If no trustee is appointed as aforesaid, the court may order that no meeting of the creditors other than the first meeting shall be called.

[This General Order is new. Its validity has been doubted. See cross references below.]

**\* Cross references: To the law:** §§ 2 (17), 44, 45, 56. See also §§ 6 and 47-a (11), and read, § 2 (11).

**To the General Orders:** XIII, XIV.

**To the Official Forms:** No. 27.

**To the Supplementary Forms:** No. 109.

**To the Equity Rules:** None.

**Illustrative Cases:** In re Soper, 1 Am. B. R. 193; In re Rung Bros., 2 Am. B. R. 620. See also under Sections Six, Forty-four, and Forty-seven of this work.

**XVI. NOTICE TO TRUSTEE OF HIS APPOINTMENT.\***

It shall be the duty of the referee, immediately upon the appointment and approval of the trustee, to notify him in person or by mail of his appointment; and the notice shall require the trustee forthwith to notify the referee of his acceptance or rejection of the trust, and shall contain a statement of the penal sum of the trustee's bond.

[General Order IX, 1867, with some slight additions as to the contents of the notice and with other minor changes.]

**\* Cross references: To the law:** §§ 44, 50-a-j-k.

**To the General Orders:** XIII.

**To the Official Forms:** Nos. 24, 25, 26.

**To the Supplementary Forms:** Nos. 171, 172.

**To the Equity Rules:** None.

**Illustrative Cases:** None.

### XVII. DUTIES OF TRUSTEE.\*

The trustee shall, immediately upon entering upon his duties, prepare a complete inventory of all the property of the bankrupt that comes into his possession. The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report. The referee may require the exceptions to be argued before him, and shall certify them to the court for final determination at the request of either party. In case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge, at a time specified in the order, why he should not be removed from office. The referee shall cause a copy of the order to be served upon the trustee at least seven days before the time fixed for the hearing, and proof of the service thereof to be delivered to the clerk. All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court.

[General Order XIX, 1867, with several slight changes.]

**\* Cross references:** *To the law:* *Duties of trustees, in general*, §§ 47, 49; *As to filing bonds*, § 50; *As to exemptions*, §§ 6, 7 (8), 47-a (11), as perhaps limited by § 2 (11); *As to appraisals and sales*, § 70-b.

**To the General Orders:** XVIII, XXI (6), XXV, XXVIII, XXIX, XXXIII, XXXV.

**To the Official Forms:** Nos. 40, 41, 47, 48, 49, 50, 51, and generally to the forms for sales, Nos. 42 to 46, inclusive.

**To the Supplementary Forms:** Nos. 109, 110, 111, 112 on exemptions, and Nos. 165, 166, 167, 168, 169 as to reports and distribution; also generally.

**To the Equity Rules:** None.

**Illustrative Cases:** *In re Camp*, 1 Am. B. R. 165, 91 Fed. 745; *In re Rung Bros.*, 1 Am. B. R. 620; *In re Smith*, 2 Am. B. R. 190, 93 Fed. 791; *In re Manning*, 7 Am. B. R. 571, 112 Fed. 948; *In re Campbell*, 10 Am. B. R. 723, 124 Fed. 417; *In re Ellis*, 10 Am. B. R. 754; and generally to cases cited under Sections Six and Forty-seven of this work.

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XVIII, XIX.] Sale of Property; Accounts of Marshal.

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**XVIII. SALE OF PROPERTY.\***

1. All sales shall be by public auction unless otherwise ordered by the court.

2. Upon application to the court, and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold, and the price received therefor, and to whom sold; which account he shall file at once with the referee.

3. Upon petition by a bankrupt, creditor, receiver, or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court.

[Paragraph 1 is new; paragraph 2 is part of General Order XXI, 1867, without change; paragraph 3 is General Order XXII, 1867, with various changes.]

**\* Cross references: To the law:** § 70-b, and as to notices, § 58-a (4).

**To the General Orders:** None.

**To the Official Forms:** Nos. 42, 43, 44, 45, 46.

**To the Supplementary Forms:** Nos. 183, 184, 185, 186, 187.

**To the Equity Rules:** None.

**Illustrative Cases:** *In re Hawkins*, 11 Am. B. R. 49, 125 Fed. 633. See cases cited in Section Seventy of this work.

**XIX. ACCOUNTS OF MARSHAL.\***

The marshal shall make return, under oath, of his actual and necessary expenses in the service of every warrant addressed to him, and for custody of property, and other services, and other actual and necessary expenses paid by him, with vouchers therefor whenever practicable, and also with a statement that the amounts charged by him are just and reasonable.

[Latter part of General Order XII, 1867, without any substantial change.]

**\* Cross references: To the law:** §§ 2 (3) (5), 3-e, 52, 69.

**To the General Orders:** X.

**To the Official Forms:** Nos. 8, 9, 10.

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Filing Papers after Reference; Proof of Debts. [XX, XXI].

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**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** See cases cited in Section Fifty-two of this work.

## XX. PAPERS FILED AFTER REFERENCE.\*

Proofs of claims and other papers filed subsequently to the reference, except such as call for action by the judge, may be filed either with the referee or with the clerk.

[This General Order is new.]

\* **Cross references:** **To the law:** *As to the duty of referees concerning papers filed with them, § 39-a; As to clerk's duties concerning same, § 51 (3). See also § 42-b.*

**To the General Orders:** XXIV.

**To the Official Forms:** None.

**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** None.

## XXI. PROOF OF DEBTS.\*

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

2. Any creditor may file with the referee a request that all notices to which he may be entitled shall be addressed to him at any place, to be designated by the post-office box or street number, as



## XXI.]

## Proof of Debts, Continued.

he may appoint; and thereafter, and until some other designation shall be made by such creditor, all notices shall be so addressed; and in other cases notices shall be addressed as specified in the proof of debt.

3. Claims which have been assigned before proof shall be supported by a deposition of the owner at the time of the commencement of proceedings, setting forth the true consideration of the debt, and that it is entirely unsecured, or if secured, the security, as is required in proving secured claims. Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and, if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter.

4. The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish *pro tanto* the original debt.

5. The execution of any letter of attorney to represent a creditor, or of an assignment of claim after proof, may be proved or acknowledged before a referee, or a United States commissioner, or a notary public. When executed on behalf of a partnership or of a corporation, the person executing the instrument shall make oath that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts. When the person executing is not personally known to the officer taking the proof or acknowledgment, his identity shall be established by satisfactory proof.

6. When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the cred-

## Taking of Testimony.

[XXII.]

itor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly.

[General Order XXXIV, 1874, with slight changes.]

**\* Cross references: To the law:** *As to proof of debts, generally,* §§ 2 (2), 57; *As to provable debts,* § 63; *As to set-off of debts,* §§ 60-c, 68.

**To the General Orders:** XXIV, XXVIII, XXXIII.

**To the Official Forms:** Nos. 20, 21, 31, 32, 33, 34, 35, 36, 37, 38, 39.

**To the Supplementary Forms:** §§ 174, 175, 176.

**To the Equity Rules:** None.

**Illustrative Cases:** *In re Sugenheimer*, 1 Am. B. R. 425, 91 Fed. 744; *In re Scott*, 1 Am. B. R. 553; *In re Blankfein*, 3 Am. B. R. 165, 97 Fed. 191; *In re Rider*, 3 Am. B. R. 192, 96 Fed. 811; *In re Finlay*, 3 Am. B. R. 738; *In re Reliance Storage, etc., Co.*, 4 Am. B. R. 49, 100 Fed. 619; *In re Doty*, 5 Am. B. R. 58; *In re Chambers, etc., Co.*, 6 Am. B. R. 707; *In re Levy*, 7 Am. B. R. 56; *In re Lyon*, 7 Am. B. R. 61; *In re Blue Ridge Packing Co.*, 11 Am. B. R. 36, 125 Fed. 619; *Matter of Lewensohn*, 9 Am. B. R. 368; and generally to those cited under the different subsections of Section Fifty-seven.

## XXII. TAKING OF TESTIMONY.\*

The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

[General Order X, 1867, with changes, recognizing the right of the referee to decide objections raised as to the competency, relevancy, and materiality of questions; and with other slight changes.]

**\* Cross references: To the law:** *As to examinations,* §§ 7 (9) 21, 38-a (2); *As to costs,* § 2 (18).

**To the General Orders:** XXII.

**To the Official Forms:** Nos. 29, 30, 56.

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XXIII, XXIV, XXV.] Orders of Referee; Transmission of Claims.

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**To the Supplementary Forms:** None.

**To the Equity Rules:** LXVII to LXIX.

**Illustrative Cases:** See generally those cited in Sections Seven and Twenty-one of this work.

### XXIII. ORDERS OF REFEREE.\*

In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.

[General Order VIII, 1867, with verbal changes.]

**\* Cross references: To the law:** Generally.

**To the General Orders:** IV, XII.

**To the Official Forms:** Generally.

**To the Supplementary Forms:** Generally.

**To the Equity Rules:** LXXXV, LXXXVI.

**Illustrative Cases:** None.

### XXIV. TRANSMISSION OF PROVED CLAIMS TO CLERK.\*

The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors.

[Compare General Order XI, 1867. This General Order does not fit into the present system of administration, and is rarely observed.]

**\* Cross references: To the law:** §§ 39-a, 57.

**To the General Orders:** XII, XX.

**To the Official Forms:** No. 19.

**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** None.

### XXV. SPECIAL MEETING OF CREDITORS.\*

Whenever, by reason of a vacancy in the office of trustee, or for any other cause, it becomes necessary to call a special meeting of the creditors in order to carry out the purposes of the act, the court

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Accounts of Referee; Review by Judge. [XXVI, XXVII].

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may call such a meeting, specifying in the notice the purpose for which it is called.

[This General Order is new. Its necessity or even value is doubted.]

**\* Cross references:** **To the law:** *As to meetings of creditors*, § 55; *As to meeting for choice of new trustee*, § 44; *As to notices of meetings*, § 58.

**To the General Orders:** XIII.

**To the Official Forms:** Nos. 52, 53, 54, 55.

**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** *In re Lewensohn*, 3 Am. B. R. 299, 98 Fed. 576.  
Consult also Sections Fifty-five and Fifty-seven of this work.

### XXVI. ACCOUNTS OF REFEREE.\*

Every referee shall keep an accurate account of his traveling and incidental expenses, and of those of any clerk or any officer attending him in the performance of his duties in any case which may be referred to him; and shall make return of the same under oath to the judge, with proper vouchers when vouchers can be procured, on the first Tuesday in each month.

[First part of General Order XII, 1867, with substantial change. Referees usually keep accurate accounts, but the making of monthly returns of expenses is rare.]

**\* Cross references:** **To the law:** §§ 9-a, 42.

**To the General Orders:** X, XXXV (2), and, by analogy, XIX.

**To the Official Forms:** None.

**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** None; but see generally Sections Thirty-nine and Forty-two of this work.

### XXVII. REVIEW BY JUDGE.\*

When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee, his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge

## XXVIII.]

## Redemption of Property, etc.

the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.

[General Order XVII, 1874, with changes.]

**\* Cross references: To the law:** §§ 2 (10), 38-a, 39-a (5).

**To the General Orders:** By analogy, XXXVI.

**To the Official Forms:** No. 58.

**To the Supplementary Forms:** Nos. 162, 163, and, by analogy, Nos. 158, 159, 160, 161.

**To the Equity Rules:** None.

**Illustrative Cases:** In re Schiller, 2 Am. B. R. 704, 96 Fed. 400; In re Scott, 3 Am. B. R. 625, 99 Fed. 404; Cunningham v. Bank, 4 Am. B. R. 192, 103 Fed. 932; In re Chambers, 6 Am. B. R. 739; In re Gottardi, 7 Am. B. R. 723; In re Koenig, 11 Am. B. R. 617. See also other cases cited in Section Thirty-nine of this work.

## XXVIII. REDEMPTION OF PROPERTY AND COMPOUNDING OF CLAIMS.\*

Whenever it may be deemed for the benefit of the estate of a bankrupt to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, real or personal, or to relieve said property from any conditional contract, and to tender performance of the conditions thereof, or to compound and settle any debts or other claims due or belonging to the estate of the bankrupt, the trustee, or the bankrupt, or any creditor who has proved his debt, may file his petition therefor; and thereupon the court shall appoint a suitable time and place for the hearing thereof, notice of which shall be given as the court shall direct, so that all creditors and other persons interested may appear and show cause, if any they have, why an order should not be passed by the court upon the petition authorizing such act on the part of the trustee.

[General Order XVII, 1867, with slight changes. This General Order is an inheritance merely. Its value, save in so far as it refers to § 27, is doubted.]

**\* Cross references: To the law:** *As to redemption of property from liens*, none, save by analogy, §§ 2 (7), 67; *As to compounding of claims*, §§ 27, 58-a (7), and, by analogy, § 26.

**To the General Orders:** XXXIII.

**To the Official Forms:** None.

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 Payment of Money; Imprisoned Debtor. [XXIX, XXX.]
 

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**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** None. But see as to compromise of controversies in Section Twenty-six of this work.

### XXIX. PAYMENT OF MONEYS DEPOSITED.\*

No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks.

[Latter half of General Order XXVII, 1867, without material change.]

**\* Cross references:** To the law: §§ 47-a, 61.

**To the General Orders:** None.

**To the Official Forms:** None.

**To the Supplementary Forms:** No. 169.

**To the Equity Rules:** None.

**Illustrative Cases:** In re Cobb, 7 Am. B. R. 202, 112 Fed. 655; In re Hoyt, 9 Am. B. R. 574, 11 Am. B. R. 784. See also Sections Forty-seven and Sixty-one of this work.

### XXX. IMPRISONED DEBTOR.\*

If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon *habeas corpus*, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy; and, if committed after the filing of his petition upon process in any civil action founded upon a claim provable in bankruptcy, the court may, upon like

## XXXI.]

## Petition for Discharge.

application, discharge him from such imprisonment. If the petitioner, during the pendency of the proceedings in bankruptcy, be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be. Before granting the order for discharge the court shall cause notice to be served upon the creditor or his attorney, so as to give him an opportunity of appearing and being heard before the granting of the order.

[General Order XXVII, 1867, without substantial change.]

**\* Cross references: To the law: § 9-a.**

**To the General Orders: XII (1).**

**To the Official Forms: None.**

**To the Supplementary Forms: None; but, by analogy, Nos. 117, 118.**

**To the Equity Rules: None.**

**Illustrative Cases:** In re Marcus, 5 Am. B. R. 365, 105 Fed. 907; In re Claiborne, 5 Am. B. R. 812, 109 Fed. 74; In re Fife, 6 Am. B. R. 258, 109 Fed. 880. See also cases cited in Section Nine of this work.

### XXXI. PETITION FOR DISCHARGE.\*

The petition of a bankrupt for a discharge shall state concisely, in accordance with the provisions of the act and the orders of the court, the proceedings in the case and the acts of the bankrupt.

[This General Order is new.]

**\* Cross references: To the law: §§ 14, 18-c.**

**To the General Orders: XXXII.**

**To the Official Forms: No. 57.**

**To the Supplementary Forms: None.**

**To the Equity Rules: XX to XXV.**

**Illustrative Cases:** See, generally, Section Fourteen of this work.

**XXXII. OPPOSITION TO DISCHARGE OR COMPOSITION.\***

A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge.

[General Order XXIV, 1867, in part.]

**\* Cross references: To the law:** §§ 12, 14.

**To the General Orders:** IV, XXXI.

**To the Official Forms:** Nos. 58, 59.

**To the Supplementary Forms:** *As to opposition to discharge*, Nos. 138, 139, 140, 141, 142, and, by analogy, Nos. 133, 134, 135, 136, 137; *As to opposition to confirmation of a composition*, Nos. 128, 129, 130, 131, 132, and, by analogy, Nos. 124, 125, 126, 127.

**To the Equity Rules:** As to appearances, pleadings, the taking of testimony, references to special masters, etc., generally.

**Illustrative Cases:** *In re Holman*, 1 Am. B. R. 600, 92 Fed. 512; *In re Hixon*, 1 Am. B. R. 610, 93 Fed. 440; *In re Albrecht*, 5 Am. B. R. 223, 104 Fed. 974; *In re Clothier*, 6 Am. B. R. 203, 108 Fed. 199. And see, generally, numerous cases cited in Section Fourteen, and a few in Section Twelve.

**XXXIII. ARBITRATION.\***

Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise.

[Part of General Order XX, 1867.]

**\* Cross references: To the law:** §§ 26, 58-a (7), and, by analogy, § 27.

**To the General Orders:** By analogy, XXVIII.

**To the Official Forms:** None.

**To the Supplementary Forms:** None.



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XXXIV, XXXV.] Costs; Compensation of Officers.

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**To the Equity Rules:** None.

**Illustrative Cases:** See Section Twenty-six and, by analogy, Section Twenty-seven of this work.

### XXXIV. COSTS IN CONTESTED ADJUDICATIONS.\*

In cases of involuntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner.

[Part of General Order XXXI, 1867, without change.]

\* **Cross references:** To the law: §§ 2 (18), 3-e.

**To the General Orders:** By analogy, X.

**To the Official Forms:** None.

**To the Supplementary Forms:** None.

**To the Equity Rules:** None.

**Illustrative Cases:** In re Wolpert, 1 Am. B. R. 436 (by analogy only); In re Ghiglione, 1 Am. B. R. 580, 93 Fed. 186; In re Philadelphia Transportation Co., 11 Am. B. R. 444. See also cases cited in Sections Two and Three of this work.

### XXXV. COMPENSATION OF CLERKS, REFEREES, AND TRUSTEES.\*

1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

2. The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

## Appeals.

[XXXVI.]

3. The compensation allowed to trustees by the act shall be in full compensation for the services performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

4. In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed.

[This General Order is new.]

\* **Cross references:** *To the law:* *As to compensation of clerks,* §§ 51, 71; *As to compensation of referees,* §§ 40, 72; *As to compensation of trustees,* §§ 48, 72; *As to pauper cases,* § 51-a (2).

**To the General Orders:** X, XII, XVII, XIX, XXVI, XXIX.

**To the Official Forms:** None.

**To the Supplementary Forms:** Nos. 170, 173.

**To the Equity Rules:** None.

**Illustrative Cases:** *In re Collier*, 1 Am. B. R. 182, 93 Fed. 191; *In re Langslow*, 1 Am. B. R. 258, 98 Fed. 869; and numerous cases cited in Sections Forty, Forty-eight, Fifty-one, and Seventy-two of this work.

## XXXVI. APPEALS.\*

1. Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a Territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States.

2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals, or from the supreme court of a Territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a justice of the Supreme Court of the United States.

3. In every case in which either party is entitled by the act to

## XXXVII, XXXVIII.] General Provisions; Forms.

take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law.

[This General Order is practically new. Compare, however, General Order XXVI, 1867.]

**\* Cross references: To the law:** §§ 24, 25.

**To the General Orders:** By analogy, XXVII.

**To the Official Forms:** None.

**To the Supplementary Forms:** Nos. 158, 159, 160, 161, and, by analogy, Nos. 162, 163.

**To the Equity Rules:** None.

**Illustrative Cases:** See, generally, under Sections Twenty-four and Twenty-five of this work.

## XXXVII. GENERAL PROVISIONS.\*

In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

[Last half of General Order XXXII, 1867, without material change.]

**\*Cross reference: To the Equity Rules:** All.

## XXXVIII. FORMS.\*

The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case.

**\*Cross reference: To the Official Forms:** All.

**To the Supplementary Forms:** All.



# OFFICIAL FORMS

AS PRESCRIBED BY

THE SUPREME COURT OF THE UNITED STATES AT THE  
OCTOBER TERM OF 1898.



# FORMS IN BANKRUPTCY.<sup>1</sup>

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[N. B.—Oaths required by the act, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken. Bankrupt Act of 1898, c. 4, § 20.]

## FORM NO. 1.

### Debtor's Petition.<sup>2</sup>

To the Honorable ..... ,

Judge of the District Court of the United States

for the ..... District of ..... :

The petition of ..... , of ..... , in the county of ..... , and district and State of ..... , ..... [*State occupation*], respectfully represents:

That he has had his principal place of business [*or has resided, or has had his domicile*]<sup>3</sup> for the greater portion of six months next immediately preceding the filing of this petition at ..... , within said judicial district;<sup>4</sup> that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule<sup>5</sup> hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property,

1. For the validity of these forms, see Section Thirty, ante.

2. Consult Sections Two, Four, Eighteen, and Fifty-nine. See also General Orders IV, V, VI, VII.

3. Strike out some or all the words in brackets, as the facts may be.

4. § 2 (1).

5. § 7-a (8).

Debtor's Petition.

[No. 1.]

both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged<sup>6</sup> by the court to be a bankrupt<sup>7</sup> within the purview of said acts.

.....

....., *Attorney.*

United States of America, District of ....., ss.:

I, ....., the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

....., *Petitioner.*

Subscribed and sworn to before me, this ... day of .....,  
A. D. 18...

.....

.....

[*Official character.*]

6. § 18-g.

7. If partners petition, use Form

No. 143, post, omitting certain allegations if all join.



No. 1. Schedule A. (1).] Creditors Entitled to Priority.

SCHEDULE A.—STATEMENT OF ALL DEBTS OF BANKRUPT.\*

SCHEDULE A. (1)

*Statement of all creditors who are to be paid in full, or to whom priority is secured by law.†*

Claims which have priority.	Reference to ledger or voucher.	Names of creditors.	Residence (if unknown, that fact must be stated).	Where and when contracted.	Nature and consideration of the debt, and whether contracted as partner or joint contractor; and if so, with whom.	Amount.	
						\$	c.
(1.) Taxes and debts due and owing to the United States.							
(2.) Taxes due and owing to the State of _____, or to any county, district or municipality thereof.							
(3.) Wages due workmen, clerks, or servants, to an amount not exceeding \$300 each, earned within three months before filing the petition.							
(4.) Other debts having priority by law.							
Total.....							

\_\_\_\_\_, *Petitioner.*

\* § 7-a (8), 39-a (2) (6); General Order IX. For suggestions as to drafting schedules, see Section Seven, *ante*, and General Order V. The insertion of the word "None" where the form calls for statements not applicable to the particular case, is usual. † § 64-a-b.

**Creditors Holding Securities.** [No. 1. Schedule A. (2).]



## Liabilities to be Paid by Others. [No. 1. Schedule A. (4).]

## SCHEDULE A. (4)

*Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, acceptors, or indorsers.*<sup>12</sup>

[N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser,<sup>13</sup>

Reference to ledger or voucher.	Names of holders as far as known.	Residence (if unknown, that fact must be stated).	Place where contracted.	Nature of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.
					\$
					c.
				Total.....	

\_\_\_\_\_, *Petitioner.*

<sup>12</sup> Consult foot-note to Schedule A (2).

<sup>13</sup> For subrogation claims, see Section Fifty-seven, *ante*.

## No. 1. Schedule A. (5).] Accommodation Paper.

## SCHEDULE A. (5)

*Accommodation paper.*<sup>14</sup>

[N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.]

Reference to ledger or voucher.	Names of holders.	Residences (if unknown that fact must be stated).	Names and residence of persons accommodated.	Place where contracted.	Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	Amount.
						\$ c.
					Total.....	

—, *Petitioner.*

## OATH TO SCHEDULE A.

United States of America, District of ....., ss:

On this .... day of ....., A. D. 18.., before me personally came ....., the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this .... day of ....., A. D. 18...

.....  
[Official character.]

<sup>14</sup>Consult foot-notes to Schedule A (4).

Real Estate.

[No. 1. Schedule B. (1).

SCHEDULE B.—STATEMENT OF ALL PROPERTY OF BANKRUPT.<sup>15</sup>

## SCHEDULE B. (1)

*Real estate.*

Location and description of all real estate owned by debtor, or held by him.	Incumbrances thereon, if any, and dates thereof.	Statement of particulars relating thereto.	Estimated value.	
			\$	c.

\_\_\_\_\_, *Petitioner.*

<sup>15</sup> Consult, for what is property of the bankrupt, Section Seventy, *ante*, and for the frame of schedules Section Seven, and General Orders V, IX.

No. 1. Schedule B. (2).] Personal Property.

SCHEDULE B. (2)<sup>16</sup>

*Personal property.*

	\$	c
<i>a.</i> —Cash on hand .....		
<i>b.</i> —Bills of exchange, promissory notes, or securities of any description (each to be set out separately) .....		
<i>c.</i> —Stock in trade, in — business of —, at —, of the value of — .....		
<i>d.</i> —Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz. ....		
<i>e.</i> —Books, prints, and pictures, viz. ....		
<i>f.</i> —Horses, cows, sheep, and other animals (with number of each), viz. ....		
<i>g.</i> —Carriages and other vehicles, viz. ....		
<i>h.</i> —Farming stock and implements of husbandry, viz. ....		
<i>i.</i> —Shipping, and shares in vessels, viz. ....		
<i>k.</i> —Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated, viz. ....		
<i>l.</i> —Patents, copyrights, and trade-marks, viz. ....		
<i>m.</i> —Goods or personal property of any other description, with the place where each is situated, viz. ....		
Total.....		

—, *Petitioner.*

<sup>16</sup> Consult foot-note to Schedule B (1).

Choses in Action. [No. 1. Schedule B. (3).]

SCHEDULE B. (3)<sup>17</sup>*Choses in action.*

	Dollars.	Cents.
a.—Debts due petitioner on open account.....		
b.—Stocks in incorporated companies, interest in joint-stock companies, and negotiable bonds.....		
c.—Policies of insurance .....		
d.—Unliquidated claims of every nature, with their estimated value.....		
e.—Deposits of money in banking institutions and elsewhere.....		
Total.....		

\_\_\_\_\_, *Petitioner.*<sup>17</sup> Consult foot-note to Schedule B (1).



No. 1. Schedule B. (4).<sup>1</sup> Property in Reversion, etc.

SCHEDULE B. (4)<sup>13</sup>

*Property in reversion, remainder, or expectancy, including property held in trust for the debtor or subject to any power or right to dispose of or to charge.*

[N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, as far as known to the debtor.]

General interest.	Particular description.	Supposed value of my interest.
Interest in land.....		\$ c.
Personal property.....		
Property in money, stock, shares, bonds, annuities, etc.....		
Rights and powers, legacies and bequests.....		
<i>Property heretofore conveyed for benefit of creditors.</i>	Total.....	Amount realized from proceeds of property conveyed.
What portion of debtor's property has been conveyed by deed of assignment or otherwise, for benefit of creditors, date of such deed, name and address of party to whom conveyed, amount realized therefrom, and disposal of same, so far as known to debtor. ....		\$ c.
What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy. ....	Total.....	
		— — —, <i>Petitioner.</i>

<sup>13</sup> Consult foot-note to Schedule B. (1).

Exempt Property. [No. 1. Schedule B. (5).]

SCHEDULE B. (5)<sup>19</sup>

*A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use.*

	Valuation.	
	\$	c.
Military uniform, arms, and equipments.....		
Property claimed to be exempted by state laws; its valuation; whether real or personal; its description and present use; and reference given to the statute of the State creating the exemption .....		
Total.....		
	_____, <i>Petitioner.</i>	

<sup>19</sup> As to what is exempt, see Section Six; as to necessity of claiming, see Section Seven. Consult also foot-note to Schedule A (1).

No. 1. Schedule B. (6).] Books, Papers, etc.

SCHEDULE B. (6)<sup>20</sup>

BOOKS, PAPERS, DEEDS, AND WRITINGS RELATING TO BANKRUPT'S BUSINESS AND ESTATE.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me, or for my use, benefit, or advantage; and also of all others which have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books.

Deeds.

Papers.


— — — — —, *Petitioner.*

OATH TO SCHEDULE B.<sup>21</sup>

United States of America, District of . . . . ., ss.:

On this . . . . day of . . . . ., A. D. 18.., before me personally came . . . . ., the person mentioned in and who subscribed to the foregoing schedule, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

.....,

.....,

[*Official character.*]

<sup>20</sup> Consult foot-note to Schedule B (1).

<sup>21</sup> This oath is perhaps unnecessary, the petition, which refers to the schedules, being verified. If used it should be changed into the form of an affidavit (as is that at the end of the petition itself), to be signed by the affiant, with the proper jurat to be signed by the officer administering the oath.

## Summary of Debts and Assets.

[No. 1.]

## SUMMARY OF DEBTS AND ASSETS.

[From the statements of the bankrupt in Schedules A and B.]

Schedule A.....	1 (1) Taxes and debts due United States.....			
".....	1 (2) Taxes due States, counties, districts, and municipalities.....			
".....	1 (3) Wages.....			
".....	1 (4) Other debts preferred by law.....			
Schedule A.....	2 Secured claims.....			
Schedule A.....	3 Unsecured claims.....			
Schedule A.....	4 Notes and bills which ought to be paid by other parties thereto.....			
Schedule A.....	5 Accommodation paper.....			
	Schedule A, total.....			
Schedule B.....	1 Real estate.....			
Schedule B.....	2-a Cash on hand.....			
".....	2-b Bills, promissory notes, and securities.....			
".....	2-c Stock in trade.....			
".....	2-d Household goods, etc.....			
".....	2-e Books, prints, and pictures.....			
".....	2-f Horses, cows, and other animals.....			
".....	2-g Carriages and other vehicles.....			
".....	2-h Farming stock and implements.....			
".....	2-i Shipping and shares in vessels.....			
".....	2-k Machinery, tools, etc.....			
".....	2-l Patents, copyrights, and trade-marks.....			
".....	2-m Other personal property.....			
Schedule B.....	3-a Debts due on open accounts.....			
".....	3-b Stocks, negotiable bonds, etc.....			
".....	3-c Policies of insurance.....			
".....	3-d Unliquidated claims.....			
".....	3-e Deposits of money in banks and elsewhere.....			
Schedule B.....	4 Property in reversion, remainder, trust, etc.....			
Schedule B.....	5 Property claimed to be excepted.....			
Schedule B.....	6 Books, deeds and papers.....			
	Schedule B, total.....			

No. 2.]

Partnership Petition.

## FORM NO. 2.

**Partnership Petition.<sup>22</sup>**

To the Honorable ..... ,

Judge of the District Court of the United States

for the .... District of ..... :

The petition of ..... respectfully represents:

That your petitioners and ..... have been partners under the firm name of ..... , having their principal place of business at ..... , in the county of ..... , and district and State of ..... , for the greater portion of the six months next immediately preceding the filing of this petition; that the said partners owe debts which they are unable to pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by .... oath, contains a full and true statement of all the debts of said partners, and, as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, verified by .... oath, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said acts.

And said ..... further states that the schedule hereto annexed, marked C, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked D, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements

<sup>22</sup>. Consult Sections Four, Five, and Fifty-nine, if all partners join. If one or more do not, consult Sections Five and Eighteen. See, generally, Section Two for the place to file and Section Seven for the schedules. Read also General Or-

ders V, VI, VII, VIII. In the "Supplementary Forms," post, Form No. 143 will be found useful when all the partners do not join in a voluntary petition; also, by way of suggestion, when they do.

concerning said property as are required by the provisions of said acts.

And said ..... further states that the schedule hereto annexed, marked E, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked F, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ..... further states that the schedule hereto annexed, marked G, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts; and that the schedule hereto annexed, marked H, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

And said ..... further states that the schedule hereto annexed, marked J, verified by his oath, contains a full and true statement of all his individual debts, and, as far as possible, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts, and that the schedule hereto annexed, marked K, verified by his oath, contains an accurate inventory of all his individual property, real and personal, and such further statements concerning said property as are required by the provisions of said acts.

Wherefore your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

.....,

.....,

.....,

*Petitioners.*

....., *Attorney.*

No. 3.] Creditors' Petition for Involuntary Bankruptcy.

....., the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of their knowledge, information, and belief.

.....,  
.....,  
.....,

*Petitioners.*

Subscribed and sworn to before me, this .... day of .....,  
A. D. 18...

.....,  
[Official character.]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

FORM No. 3.

Creditors' Petition.<sup>23</sup>

To the Honorable .....,

Judge of the District Court of the United States  
for the ..... District of.....:

The petition of ....., of ....., and ....., of ....., and ....., of ....., respectfully shows:<sup>24</sup>

That ....., of ....., has for the greater portion of six months next preceding the date of filing this petition, had his principal place of business, [*or resided, or had his domicile*] at ....., in the county of ..... and State and district aforesaid, and owes debts to the amount of \$1,000.

That your petitioners are creditors of said ....., having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500. That the nature and amount of your petitioners' claims are as follows:

.....  
.....

<sup>23</sup>. This form is demurrable. The use of Form No. 144, post, is suggested.

<sup>24</sup>. For the necessary allegations in a creditors' petition consult Sections Two, Three, Four, Five (if against a partnership), Eighteen, and Fifty-nine. See also General Orders V, VI, VII, IX, XI, and Equity Rules XX to XXV, XXVIII to XXX. See also *Mather v. Coe*, 1 Am. B. R. 504, 92 Fed. 333.

And your petitioners further represent that said .....  
 is insolvent, and that within four months next preceding the date  
 of this petition the said ..... committed an act of bank-  
 ruptcy, in that he did heretofore, to wit, on the day of .....  
 .....

Wherefore your petitioners pray that service of this petition,  
 with a subpoena, may be made upon ..... , as provided  
 in the acts of Congress relating to bankruptcy, and that he may be  
 adjudged by the court to be a bankrupt within the purview of said  
 acts.

.....	.....
.....	.....
.....	.....
.....	.....
<i>Attorney.</i>	<i>Petitioners.</i>

United States of America, District of ..... ss.:

....., ..... , being three of the  
 petitioners above named, do hereby make solemn oath that the  
 statements contained in the foregoing petition, subscribed by them,  
 are true.

Before me, ....., this .... day of ....., 189...

.....

.....

[*Official character.*]

[Schedules to be annexed corresponding with schedules under  
 Form No. 1.]



No. 4.] Order to Show Cause upon Creditors' Petition.

FORM NO. 4.

Order to Show Cause upon Creditors' Petition.<sup>25</sup>

In the District Court of the United States for the ..... District  
of .....,

IN THE MATTER OF

.....

} In Bankruptcy.

Upon consideration of the petition of ..... that .....  
..... be declared a bankrupt, it is ordered, that the said .....  
..... do appear at this court, as a court of bankruptcy, to be  
holden at ....., in the district aforesaid, on the ..... day of  
....., at ... o'clock in the ..... noon, and show cause, if any  
there be, why the prayer of said petition should not be granted;  
and

It is further ordered that a copy of said petition, together with a  
writ of subpœna, be served on said ..... by delivering  
the same to him personally or by leaving the same at his last usual  
place of abode in said district, at least five days before the day  
aforesaid.

Witness the Honorable ..... judge of the said court,  
and the seal thereof, at ....., in said district, on the ..... day  
of ....., A. D. 18...

{ Seal of }  
{ the court. }

.....,

*Clerk.*

<sup>25</sup>. This form is archaic. It is an adaptation from Form No. 57, under the law of 1867, and does not fit either the present law or the general or-  
ders. It is now rarely used. Form No. 5 is enough. Consult Section Eighteen of this work.

## FORM NO. 5.

**Subpœna to Alleged Bankrupt.<sup>26</sup>**

United States of America, .... District of .....

To ....., in said district, greeting:

For certain causes offered before the District Court of the United States of America within and for the .... district of ....., as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear<sup>27</sup> before our said District Court to be holden at ....., in said district, on the .... day of ....., A. D. 189.., ..... to answer<sup>28</sup> to a petition filed by ..... in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable ....., judge of said court, and the seal thereof, at ....., this .... day of ....., A. D. 189..

{ Seal of  
the court. }

.....,

*Clerk.*<sup>29</sup>

<sup>26</sup>. This is always issued and is tested by the clerk. See General Order III. For method of service, see Section Eighteen, ante, and note that the time within which to appear has been shortened by the amendatory act of 1903, as has the time for service by publication.

<sup>27</sup>. For methods of appearance, see Section Eighteen.

<sup>28</sup>. For the memorandum to be put at the bottom of this subpœna,

see Equity Rule XII. Consult also for process and service, Equity Rules VII to XVI.

<sup>29</sup>. For "Order Directing Service by Publication," see Form No. 145; for "General Appearance," see Form No. 146; for "Appearance by Intervening Creditor," see Form No. 147; and for other forms useful in involuntary proceedings, see "Supplementary Forms," post.

No. 6.]

Denial of Bankruptcy.

FORM NO. 6.

Denial of Bankruptcy.<sup>30</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy.

At ....., in said district, on the .... day of ....., A. D. 18...

And now the said ..... appears, and denies<sup>31</sup> that he has committed the act of bankruptcy set forth in said petition, or that he is insolvent, and avers that he should not be declared bankrupt for any cause in said petition alleged; and this he prays may be inquired of by the court,<sup>32</sup> [or, he demands that the same may be inquired of by a jury.]<sup>33</sup>

.....

Subscribed and sworn to before me, this .... day of .....,  
A. D. 18...

.....,

[Official character.]

30. Consult for available defenses to a creditors' petition, Sections Two, Three, Four, Five (if against a partnership), Eighteen, and Fifty-nine; for time to file denial (answer), see § 18-b, as amended by the act of 1903. See also *Mather v. Coe*, 1 Am. B. R. 504, 92 Fed. 333.

31. For form of "General Answer," see Form No. 149; for "An-

swer Alleging More than Twelve Creditors," see Form No. 150; and for other useful forms in involuntary cases, see "Supplementary Forms," post.

32. For pleadings in equity, see Equity Rules generally.

33. The demand for a jury trial is often in a separate paper; see Form No. 148.

Order for Jury Trial; Warrant to Marshal. [Nos. 7, 8.]

## FORM NO. 7.

Order for Jury Trial.<sup>34</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

} In Bankruptcy.

At ....., in said district, on the .... day of ....., 18...

Upon the demand in writing filed by ..... alleged to be a bankrupt, that the fact of the commission by him of an act of bankruptcy, and the fact of his insolvency may be inquired of by a jury, it is ordered, that said issue be submitted to a jury.<sup>35</sup>

{ Seal of  
the court. }

.....,

*Clerk.*

## FORM NO. 8.

Special Warrant to Marshal.<sup>36</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

} In Bankruptcy.

To the marshal of said district or to either of his deputies, greeting:

Whereas a petition for adjudication of bankruptcy was, on the .... day of ....., A. D. 18.., filed against ..... of the

<sup>34.</sup> This follows as a matter of course the timely filing of a denial in the shape of Form No. 6, provided the denial puts at issue either insolvency or the commission of an act of bankruptcy; or, if such an issue is made by an answer and demand of jury trial in the method suggested by Forms Nos. 148 and 149.

<sup>35.</sup> For practice on jury trials consult Section Nineteen, ante. See also General Order III. For costs in contested adjudications, see General Order XXXIV.

<sup>36.</sup> This form is somewhat of an

No. 8.]

Warrant to Marshal, Continued.

county of ..... and State of ....., in said district, and said petition is still pending; and whereas it satisfactorily appears that said ..... has committed an act of bankruptcy [*or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value*], you are therefore authorized and required to seize and take possession of all the estate, real and personal, of said ..... , and of all his deeds, books of account, and papers, and to hold and keep the same safely subject to the further order of the court.

Witness the Honorable ..... , judge of the said court, and the seal thereof, at ..... , in said district, on the .... of ..... , A. D. 189...

{ Seal of  
the court. }

..... ,

*Clerk.*

RETURN BY MARSHAL THEREON.

By virtue of the within warrant, I have taken possession of the estate of the within-named ..... , and of all his deeds, books of account, and papers which have come to my knowledge.

..... ,

*Marshal [or Deputy Marshal].*

*Fees and Expenses.*

- |  |  |  |
|--|--|--|
| 1. Service of warrant.....   |  |  |
| 2. Necessary travel, at the rate of six cents a mile each way..... |  |  |

- |   |  |  |
|---|--|--|
| 3. Actual expenses in custody of property and other services, as follows..... |  |  |
|---|--|--|

[Here state the particulars.]

..... ,

*Marshal [or Deputy Marshal].*

inheritance from the law of 1867. It is useful in seizures of property authorized by §§ 3-e and 69. It is suggestive when a receiver is appointed under § 2 (3) and given power to take possession of the bankrupt's property under § 2 (15). See the appropriate Sections of this work; also General Orders III, X, XIX, and Equity Rule XV. The oath at the end of the form may be taken before any of the officers mentioned in § 20.

## Bond of Petitioning Creditor.

[No. 9.]

District of . . . . ., A. D. 18..

Personally appeared before me the said . . . . ., and made oath that the above expenses returned by him have been actually incurred and paid by him, and are just and reasonable.

. . . . .,

*Referee in Bankruptcy.*

## FORM NO. 9.

Bond of Petitioning Creditor.<sup>37</sup>

Know all men by these presents: That we, . . . . ., as principal, and . . . . ., as sureties, are held and firmly bound unto . . . . ., in the full and just sum of . . . . . dollars, to be paid to the said . . . . ., executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this . . . day of . . . . ., A. D. 18..

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the . . . district of . . . . . against the said . . . . ., and the said . . . . . has applied to that court for a warrant to the marshal of said district directing him to seize and hold the property of said . . . . ., subject to the further orders of said district court.

Now, therefore, if such a warrant shall issue for the seizure of said property, and if the said . . . . . shall indemnify the said . . . . . for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in

presence of —

. . . . . [SEAL.]

. . . . .

. . . . . [SEAL.]

. . . . .

. . . . . [SEAL.]

Approved this . . . day of . . . . ., A. D. 18..

. . . . .,

*District Judge.*

<sup>37</sup>. This bond seems to conform to the requirements of § 69. It can be used also in seizures under § 3-e. See foot-note to Form No. 8.

No. 10.]

Bond to Marshal.

## FORM NO. 10.

**Bond to Marshal.<sup>38</sup>**

Know all men by these presents: That we, . . . . ., as principal, and . . . . ., as sureties, are held and firmly bound unto . . . . ., marshal of the United States for the . . . . . district of . . . . ., in the full and just sum of . . . . . dollars, to be paid to the said . . . . ., his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this . . . . . day of . . . . ., A. D. 189...

The condition of this obligation is such that whereas a petition in bankruptcy has been filed in the district court of the United States for the . . . . . district of . . . . ., against the said . . . . ., and the said court has issued a warrant to the marshal of the United States for said district, directing him to seize and hold property of the said . . . . ., subject to the further order of the court, and the said property has been seized by said marshal as directed, and the said district court, upon a petition of said . . . . ., has ordered the said property to be released to him.

Now, therefore, if the said property shall be released accordingly to the said . . . . ., and the said . . . . ., being adjudged a bankrupt, shall turn over said property or pay the value thereof in money to the trustee, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in the

presence of —

. . . . . [SEAL.]

. . . . .

. . . . . [SEAL.]

. . . . .

. . . . . [SEAL.]

Approved this . . . . . day of . . . . ., A. D. 189...

. . . . .,

*District Judge.*

<sup>38</sup>. See foot-notes to Forms Nos. 8 and 9. This bond seems to apply only to § 69.

## FORM NO. 11.

**Adjudication that Debtor is Not Bankrupt.<sup>39</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

} In Bankruptcy.

At ....., in-said district, on .... day of ....., A. D. 18..,  
before the Honorable ....., judge of the ..... district  
of .....

This cause came on to be heard at ....., in said court, upon the  
petition of ..... that ..... be adjudged a bankrupt within the  
true intent and meaning of the acts of Congress relating to bank-  
ruptcy, and [*here state the proceedings, whether there was no oppo-*  
*sition, or, if opposed, state what proceedings were had*].

And thereupon, and upon consideration of the proofs in said cause  
[*and the arguments of counsel thereon, if any*], it was found that  
the facts set forth in said petition were not proved; and it is there-  
fore adjudged that said ..... was not a bankrupt, and that said  
petition be dismissed, with costs.

Witness the Honorable ....., judge of said court, and  
the seal thereof, at ....., in said district, on the ..... day of  
....., A. D. 18...

{ Seal of }  
{ the court. }

..... ,

Clerk.

<sup>39</sup>. This form is the converse of VI, VII, XXXIV; and compare Form No. 12. See, generally, Sec- Equity Rules LXXXV and tions Two, Three, Four, Five (if LXXXVI. Numerous forms in against a partnership), Eighteen, and point by analogy will be found in Fifty-nine; General Orders IV, V, "Supplementary Forms," post.



No. 12.]

Adjudication of Bankruptcy.

## FORM NO. 12.

Adjudication of Bankruptcy.<sup>40</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

At ....., in said district, on the ..... day of ....., A. D. 18.., before the Honorable ....., judge of said court in bankruptcy, the petition of ..... that<sup>41</sup> ..... be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said ..... is hereby declared and adjudged bankrupt accordingly.

Witness the Honorable ....., judge of said court, and the seal thereof, at ....., in said district, on the .... day of ....., A. D. 18...

{ Seal of  
the court. }

.....,

*Clerk.*

40. The use of this form is quite universal. When the adjudication is made by the referee (§ 38-a (1)), it should follow the framework of the numerous referee orders in "Supplementary Forms," post, note the absence of the judge from the district or the division, the receipt of an order of reference from the clerk certifying that fact (§ 18-f-g; Form No. 15), and omit the teste clause, but otherwise follow the above phraseology. See, generally, in Sections Eighteen and Thirty-eight.

41. If the adjudication is of a partnership and the partners, see Section Five, ante, for the proper words here, and insert the same in the title.

## Appointment, Oath, and Report of Appraisers.

[No. 13.]

## FORM NO. 13.

Appointment, Oath, and Report of Appraisers.<sup>42</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

It is ordered that ..... of ....., of ....., and ..... of ....., three disinterested persons, be, and they are hereby, appointed appraisers to appraise the real and personal property belonging to the estate of the said bankrupt set out in the schedules now on file in this court, and report their appraisal to the court, said appraisal to be made as soon as may be, and the appraisers to be duly sworn.

Witness my hand this .... day of ....., A. D. 18...

.....,

*Referee in Bankruptcy.*<sup>43</sup>

.... District of ....., ss.:

Personally appeared the within-named ..... and severally made oath that they will fully and fairly appraise the afore-said real and personal property according to their best skill and judgment.

.....  
.....  
.....

Subscribed and sworn to before me, this .... day of .....,  
A. D. 189...

.....,  
[Official character.]

<sup>42</sup>. See Section Seventy and compare General Order XVII.

<sup>43</sup>. The appraisers can be sworn in before any officer mentioned in § 20.

No. 14.] Order of Reference After Adjudication.

We, the undersigned, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:<sup>44</sup>

	Dollars.	Cents.

In witness whereof we hereunto set our hands, at . . . . ., this  
 .... day of . . . . ., A. D. 18...

.....  
 .....  
 .....

FORM NO. 14.

Order of Reference.<sup>45</sup>

In the District Court of the United States for the . . . . . District  
 of . . . . .

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

Whereas . . . . ., of . . . . ., in the county of . . . . . and  
 district aforesaid, on the .... day of . . . . ., A. D. 18.., was duly

<sup>44</sup>. The schedule here is much too short. It is thought that there should be at least two schedules, one for real estate and the other for personal property, and that the appraisers should set out the various items with much of the particularity required of a bankrupt (§ 7 (8)). A statement of the basis of valuation, as "at cost," or "25% off cost," and of the incumbrances, if any, will also prove valuable to the officers and the creditors. At the end of the schedules there should also be a "summary statement."

<sup>45</sup>. This order is discussed in the

## Order of Reference in Judge's Absence.

[No. 15.]

adjudged a bankrupt upon a petition filed in this court by [*or*, against] him on the .... day of ....., A. D. 189.., according to the provisions of the acts of Congress relating to bankruptcy.

It is thereupon ordered, that said matter be referred to .....  
 ....., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said ..... shall attend before said referee on the .... day of ..... at ....., and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said ..... bankruptcy.

Witness the Honorable ....., judge of the said court, and the seal thereof, at ..... in said district, on the .... day of ....., A. D. 18...

{ Seal of  
the court. }

.....,

Clerk.

## FORM No. 15.

Order of Reference in Judge's Absence.<sup>46</sup>

In the District Court of the United States for the ..... District  
 of .....

IN THE MATTER OF

.....

In Bankruptcy.

Whereas on the .... day of ....., A. D. 18.., a petition was filed to have ....., of ....., in the county of ..... and district aforesaid, adjudged a bankrupt according to the provisions of the acts of Congress relating to bankruptcy; and whereas the judge of said court was absent from said district at the time of filing said petition [*or, in case of involuntary bankruptcy*, on the next day after the last day on which pleadings might have been filed, and none have been filed by the bankrupt or any of his creditors], it is thereupon ordered that the said matter be referred to

text. See Sections Eighteen and Twenty-two. Consult also General Order XII.

46. See foot-notes to Form No. 12.

No. 16.]

Referee's Oath of Office.

....., one of the referees in bankruptcy of this court, to consider said petition and take such proceedings therein as are required by said acts; and that the said ..... shall attend before said referee on the .... day of ....., A. D. 189..., at .....

Witness my hand and the seal of the said court, at ....., in said district, on the .... day of ....., A. D. 189...

{ Seal of  
the court. }

.....,

*Clerk.*

FORM NO. 16.

**Referee's Oath of Office.<sup>47</sup>**

I, ....., do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as referee in bankruptcy, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.

.....

Subscribed and sworn to before me, this .... day of ....., A. D. 18...

.....,

*District Judge.*

FORM NO. 17.

**Bond of Referee.<sup>48</sup>**

Know all men by these presents: That we, ..... of ..... as principal, and ..... of ..... and ..... of ....., as sureties, are held and firmly bound to the United States of America in the sum of ..... dollars, lawful money of the United States, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this ..... day of ....., A. D. 189...

<sup>47</sup>. See Section Thirty-six. This oath can be taken before any officer mentioned in § 20.

<sup>48</sup>. This bond is required by § 50.

## Notice of First Meeting of Creditors.

[No. 18.]

The condition of this obligation is such that whereas the said ..... has been on the .... day of ....., A. D. 18.., appointed by the Honorable ....., judge of the district court of the United States for the ..... district of ....., a referee in bankruptcy in and for the county of ....., in said district, under the acts of Congress relating to bankruptcy.

Now, therefore, if the said ..... shall well and faithfully discharge and perform all the duties pertaining to the said office of referee in bankruptcy, then this obligation to be void; otherwise to remain in full force and virtue.

Signed and sealed

in the presence of —

..... [L. s.]

..... [L. s.]

..... [L. s.]

Approved this ..... day of ....., A. D. 189..

.....,

*District Judge.*

FORM NO. 18.

**Notice of First Meeting of Creditors.<sup>49</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

To the creditors of ....., of ....., in the county of ....., and district aforesaid, a bankrupt.

Notice is hereby given that on the .... day of ....., A. D. 18.., the said ..... was duly adjudicated bankrupt; and that

<sup>49</sup>. The use of this form is quite universal. With some changes it can be adapted to fit all of the notices given by the referee, and not by the clerk. See Forms Nos. 177, 178, 179, in "Supplementary Forms," post. For proofs of mailing and of publication, see Forms Nos. 180, 181. For notices given by the clerk in the form of orders to show cause, see

No. 19.] List of Debts Proved at First Meeting.

the first meeting of his creditors will be held at ..... in ....., on the ..... day of ....., A. D. 18.., at .... o'clock in the ..... noon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

.....,

*Referee in Bankruptcy.*

....., 18...

FORM NO. 19.

List of Debts Proved at First Meeting.<sup>50</sup>

In the District Court of the United States for the ..... District of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

At ....., in said district, on the .... day of ....., A. D. 18.., before ....., referee in bankruptcy.

The following is a list of creditors who have this day proved their debts:

Names of creditors.	Residence.	Debts proved.	
		Dolls.	Cts.

.....,

*Referee in Bankruptcy.*

Forms Nos. 127, 136, 155. Consult also Section Fifty-eight, generally, and General Order XXI (2).

50. This form is archaic. It does not fit the present law or practice, and

is rarely, if ever, used. See General Order XXIV, which is also practically a dead letter, and Sections Thirty-nine and Fifty-seven of this work.

## FORM NO. 20.

**General Letter of Attorney in Fact when Creditor is not Represented  
by Attorney at Law.<sup>51</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

To ..... ,

..... :

I, ....., of ....., in the county of ..... and State of ....., do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter, or at such other place and time as may be appointed by the court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held

<sup>51</sup>. See §§ 1 (9), 57, and General Orders IV and XXI (5). Consult also discussion of the necessity of power of attorney to an attorney in law representing a creditor in a bankruptcy proceeding, in Section Fifty-six, ante.



No. 21.]

Special Letter of Attorney.

therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other purpose in my interest whatsoever, with full power of substitution.

In witness whereof I have hereunto signed my name and affixed my seal the .... day of ....., A. D. 189...

..... [L. s.]

Signed, sealed, and delivered in presence of —

.....,

Acknowledged before me, this .... day of ....., A. D. 189..

.....,

[*Official character.*]

FORM NO. 21.

Special Letter of Attorney in Fact.<sup>52</sup>

IN THE MATTER OF

.....

*Bankrupt* .

} In Bankruptcy.

To .....,

.....:

I hereby authorize you, or any one of you, to attend the meeting of creditors in this matter, advertised or directed to be holden at ....., on the .... day of ...., before ....., or any adjournment thereof, and then and there ..... for ..... and in ..... name to vote for or against any proposal or resolution that may be lawfully made or passed at such meeting or adjourned meeting, and

<sup>52</sup>. See foot-note to Form No. 20. It is not given general authority. This form is for use when the attorney is not given general authority. It is rarely used.

## Appointment of Trustee by Creditors.

[No. 22.]

in the choice of trustee or trustees of the estate of the said bankrupt.

..... [L. S.]

In witness whereof I have hereunto signed my name and affixed my seal the .... day of ....., A. D. 189..

Signed, sealed, and delivered  
in presence of —

.....

Acknowledged before me, this .... day of ....., A. D. 18..

.....,

[Official character.]

## FORM No. 22.

Appointment of Trustee by Creditors.<sup>53</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt* .

} In Bankruptcy.

At ....., in said district, on the .... day of ....., A. D. 18.., before ....., referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the [*here insert the names of the newspapers in which notice was published*], we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint .....

<sup>53</sup>. Cross-references: For who appoints trustees, §§ 2 (17), 44; for qualifications of trustees, § 45; for meetings of creditors, § 55; for who may vote at such meetings, § 56; for notices of meetings of creditors, § 58-a-b. See also General Orders XIII, XIV, XV.

No. 23.]

Appointment of Trustee by Referee.

of . . . . ., in the county of . . . . . and State of . . . . ., to be the trustee.. of the said bankrupt's estate and effects.

Signatures of creditors.	Residence of the same.	Amount of debt.	
		Dolls.	Cts.

Ordered, that the above appointment of trustee.. be, and the same is hereby approved.<sup>54</sup>

.....,

*Referee in Bankruptcy.*

FORM NO. 23.

Appointment of Trustee by Referee.<sup>55</sup>

In the District Court of the United States for the . . . . . District of . . . . .

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

At . . . . ., in said district, on the . . . . day of . . . . ., A. D. 18. ., before . . . . ., referee in bankruptcy.

This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the [*here insert the name of the newspapers in which notice was published*] I, the undersigned referee of the said court in bankruptcy, sat at the time and place above mentioned, pursuant

<sup>54</sup>. This form is also somewhat archaic. It is not often used. Referees having the right to approve or disapprove the choice of creditors (General Order XIII), a brief order of approval and fixing the bond, but without requiring the signatures of creditors, is suggested as a substitute.

See Form No. 164. For order dispensing with the appointment of trustee (General Order XV), see Form No. 27 and compare Form No. 109.

<sup>55</sup>. See foot-note to Form No. 22. Form No. 164 can easily be adapted to fit the facts outlined above.

## Notice to Trustee of His Appointment.

[No. 24.]

to such notice, to take the proof of debts and for the choice of trustee under the said bankruptcy; and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a trustee of said bankrupt's estate, and therefore I do hereby appoint . . . . ., of . . . . ., in the county of . . . . . and State of . . . . ., as trustee of the same.

. . . . .,

*Referee in Bankruptcy.*

## FORM NO. 24.

Notice to Trustee of His Appointment.<sup>56</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

To . . . . ., of . . . . ., in the county of . . . . ., and district aforesaid:

I hereby notify you that you were duly appointed trustee [or one of the trustees] of the estate of the above-named bankrupt at the first meeting of the creditors, on the . . . day of . . ., A. D. 18.., and I have approved said appointment. The penal sum of your bond as such trustee has been fixed at . . . . . dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at . . . . . the . . . day of . . . . ., A. D. 18..

. . . . .,

*Referee in Bankruptcy.*

<sup>56</sup> This form seems to be required by General Order XVI. It is, however, little used. As to the trustee's bond, see § 50.

No. 25.]

Bond of Trustee.

FORM NO. 25.

**Bond of Trustee.<sup>57</sup>**

Know all men by these presents: That we, ..... of ....., as principal, and ....., of ....., and ....., of ....., as sureties, are held and firmly bound unto the United States of America in the sum of ..... dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this .... day of ....., A. D. 189...

The condition of this obligation is such, that whereas the above-named ..... was, on the .... day of ....., A. D. 189..., appointed trustee in the case pending in bankruptcy in said court, wherein ..... is the bankrupt, and he, the said ..... has accepted said trust with all the duties and obligations pertaining thereunto:

Now, therefore, if the said ....., trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

Signed and sealed in

presence of —

.....  
.....  
.....

....., [SEAL.]  
....., [SEAL.]  
..... [SEAL.]

<sup>57</sup>. The court must "receive" evidence of the actual value of the securities. Where they are natural persons this can best be done by adding an affidavit as to property to the bond. Thus see Form No. 171, post.

## Order Approving Bond; That No Trustee be Appointed. [Nos. 26, 27.]

## FORM NO. 26.

**Order Approving Trustee's Bond.<sup>58</sup>**

At a court of bankruptcy, held in and for the ..... District of  
....., at ....., ....., this .... day of ....., 189..

Before ..... , referee in bankruptcy, in the District  
Court of the United States for the .... District of .....

IN THE MATTER OF

..... } In Bankruptcy.  
*Bankrupt .*

It appearing to the Court ....., of ....., and in said  
district, has been duly appointed trustee of the estate of the above-  
named bankrupt, and has given a bond with sureties for the faith-  
ful performance of his official duties, in the amount fixed by the  
creditors [*or* by order of the court], to wit, in the sum of .....  
dollars, it is ordered that the said bond be, and the same is hereby,  
approved.

..... ,

*Referee in Bankruptcy.*

## FORM NO. 27.

**Order that No Trustee be Appointed.<sup>59</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

..... } In Bankruptcy.  
*Bankrupt .*

It appearing that the schedule of the bankrupt discloses no  
assets, and that no creditor has appeared at the first meeting, and

<sup>58</sup>. This order is not so phrased as  
to give certain important facts when  
recorded in a record office (§ 21-e).  
Hence Form No. 172, post. See also

Sections Twenty-one and Fifty of this  
work.

<sup>59</sup>. See General Order XV and  
foot-notes. Consult also Sections

No. 28.]

Order for Examination of Bankrupt.

that the appointment of a trustee of the bankrupt's estate is not now desirable, it is hereby ordered that, until further order of the court, no trustee be appointed and no other meeting of the creditors be called.

.....,

*Referee in Bankruptcy.*

FORM NO. 28.

**Order for Examination of Bankrupt.<sup>60</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

At ....., on the .... day of ....., A. D. 18..

Upon the application of ....., trustee of said bankrupt [or creditor of said bankrupt], it is ordered that said bankrupt attend before ....., one of the referees in bankruptcy of this court, at .... on the .... day of ....., at .. o'clock in the .... noon, to submit to examination under the acts of Congress relating to bankruptcy, and that a copy of this order be delivered to him, the said bankrupt, forthwith.

.....,

*Referee in Bankruptcy.*

Six and Forty-seven. If this form is used it may, perhaps, be supplemented as to the bankrupt's exempt property by Form No. 109.

<sup>60.</sup> See Sections Seven and Twenty-one, also Section Twelve.

Compare General Order XII (1). This form is rarely used; the bankrupt appears without a formal order. Where the testimony of one not the bankrupt is desired Form No. 30 is used.

## FORM NO. 29.

**Examination of Bankrupt or Witness.<sup>61</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

In Bankruptcy.

*Bankrupt .*

At ....., in said district, on the .... day of ....., A. D. 18.., before ....., one of the referees in bankruptcy of said court. ...., of ....., in the county of ....., and State of ....., being duly sworn and examined at the time and place above mentioned, upon his oath says: [*Here insert substance of examination of party.*]

.....  
*Referee in Bankruptcy.*

## FORM NO. 30.

**Summons to Witness.<sup>62</sup>**

To .....

Whereas ....., of ....., in the county of ....., and State of ....., has been duly adjudged bankrupt, and the proceeding in bankruptcy is pending in the District Court of the United States for the ..... District of .....,

These are to require you, to whom this summons is directed, personally to be and appear before ....., one of the ref-

<sup>61</sup>. This is archaic. The bankrupt or the witness is sworn and his examination taken down by a stenographer and transcribed, and the testimony, after being read over and signed, is made a part of the referee's record-book. Consult General Order XXII; also §§ 7 (9), 21, 38-a (2), 41-a.

<sup>62</sup>. Cross-references: To the law, §§ 7 (9), 21, 52-b; to the General Orders, III, XXII; to the Forms, No. 28. See also, for designation of persons other than the marshal to serve subpoenas, Equity Rule XV, though the phrasing of the Return, supra, seems to indicate that any person may serve a subpoena without specific designation.



No. 30.]

Return of Summons to Witness.

erees in bankruptcy of the said court, at ....., on the .... day of ....., at .. o'clock in the .... noon, then and there to be examined in relation to said bankruptcy.

Witness the Honorable ....., judge of said court, and the seal thereof at ....., this .... day of ....., A. D. 189..

.....

*Clerk.*

## Return of Summons to Witness.

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt.*

On this .... day of ....., A. D. 18.., before me came .....  
 ....., of ....., in the county of ..... and State of ....., and  
 makes oath, and says that he did, on ....., the ..... day of .....,  
 A. D. 189.., personally serve ....., of ....., in the  
 county of ..... and State of ....., with a true copy of the sum-  
 mons hereto annexed, by delivering the same to him; and he fur-  
 ther makes oath and says that he is not interested in the proceeding  
 in bankruptcy named in said summons.

.....

Subscribed and sworn to before me, this .... day of .....,  
 A. D. 18..

.....

## FORM NO. 31.

**Proof of Unsecured Debt.<sup>63</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

At ....., in said district of ....., on the .... day of .....,  
A. D. 189.., came ....., of ....., in the county of  
....., in said district of ....., and made oath, and says that  
....., the person by [*or against*] whom a petition for  
adjudication of bankruptcy has been filed, was at and before the  
filing of said petition, and still is, justly and truly indebted to said  
deponent in the sum of ..... dollars; that the consideration of  
said debt is as follows: .....  
.....  
.....  
that no part of said debt has been paid [*except* .....  
.....];  
that there are no set-offs or counterclaims to the same [*except*  
.....];  
and that deponent has not, nor has any person by his order, or to

<sup>63</sup>. Consult Section Fifty-seven. when such account became or will  
See also General Order XXI. This become due, and (4) if by a corpora-  
form does not fit the latter and special tion (see Form No. 33) why the claim  
clauses must usually be added. Thus is not verified by its treasurer, and  
(1) that no note is held to or judg- (5) if the claim has been assigned af-  
ment entered on the debt, and ter the bankruptcy, certain other al-  
(2) concerning the average due date legations as to the assignment. For  
on an account maturing at different these special clauses see Form No.  
times, and (3) if on open account, 174.

No. 32.]

Proof of Secured Debt.

his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

.....,

*Creditor.*

Subscribed and sworn to before me, this .... day of .....,  
A. D. 18...

.....,<sup>64</sup>

[Official character.]

FORM NO. 32.

Proof of Secured Debt.<sup>65</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

At ....., in said district of ....., on the .... day of .....,  
A. D. 189.., came ....., of ....., in the county of  
....., in said district of ....., and made oath, and says that  
....., the person by [or against] whom a petition for  
adjudication of bankruptcy has been filed, was at and before the  
filing of said petition, and still is, justly and truly indebted to said  
deponent, in the sum of ..... dollars; that the consideration of  
said debt is as follows .....; that no part  
of said debt has been paid [except .....]; that there are  
no set-offs or counterclaims to the same [except .....];

<sup>64</sup> This can be sworn to before the laws of the State where the same are to be taken." See § 20.  
<sup>65</sup> See foot-notes to Form No. 31.

## Proof of Debt Due Corporation.

[No. 33.]

and that the only securities held by this deponent for said debt are the following: .....

.....

.....,

*Creditor.*

Subscribed and sworn to before me, this .... day of .....,  
A. D. 18...

.....,

[*Official character.*]

## FORM NO. 33.

**Proof of Debt Due Corporation.<sup>66</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

At ....., in said district of ....., on the .... day of .....,  
A. D. 189.., came ....., of ....., in the county of  
....., and State of ....., and made oath, and says that  
he is ..... of the ....., a corporation incorporated by and  
under the laws of the State of ....., and carrying on business  
at ....., in the county of ..... and State of ....., and that  
he is duly authorized to make this proof, and says that the said  
....., the person by [*or against*] whom a petition for  
adjudication of bankruptcy has been filed, was at and before the  
filing of the said petition, and still is justly and truly indebted to

<sup>66</sup>. See foot-notes to Form No. 31.

No. 34.]

Proof of Debt by Partnership.

said corporation in the sum of ..... dollars; that the consideration of said debt is as follows: .....; that no part of said debt has been paid [except .....]; that there are no set-offs or counterclaims to the same [except .....]; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

.....,  
..... of said Corporation.

Subscribed and sworn to before me, this .... day of .....,  
'A. D. 18...

.....,  
[Official character.]

FORM NO. 34.

Proof of Debt by Partnership.<sup>67</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

At ....., in said district of ....., on the .... day of .....,  
A. D. 189.., came ....., of ....., in the county of .....,  
in said district of ....., and made oath, and says that he is one of the firm of ....., consisting of himself and .....,  
of ....., in the county of ..... and State of .....; that the said ....., the person by [or against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and

67. See foot-notes to Form No. 31.

Proof of Debt by Agent or Attorney.

[No. 35.]

truly indebted to this deponent's said firm in the sum of ..... dollars; that the consideration of said debt is as follows: .....; that no part of said debt has been paid [except .....]; that there are no set-offs or counterclaims to the same [except .....]; and this deponent has not, nor has his said firm, nor has any person by their order, or to this deponent's knowledge or belief, for their use, had or received any manner of security for said debt whatever.

.....,

*Creditor.*

Subscribed and sworn to before me, this .... day of ....., A. D. 18...

.....,

[*Official character.*]

FORM NO. 35.

**Proof of Debt by Agent or Attorney.<sup>68</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

At ....., in said district of ....., on the .... day of ....., A. D. 189..., came ..... of ....., in the county of ....., and State of ....., attorney [*or* authorized agent] of ....., in the county of ....., and State of ....., and made oath and says that ....., the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the said ....., in the sum of ..... dollars; that the con-

<sup>68</sup>. See foot-notes to Form No. 31.

No. 36.]

Proof of Secured Debt by Agent.

sideration of said debt is as follows: .....  
 .....;  
 that no part of said debt has been paid [except .....]  
 .....];  
 and that this deponent has not, nor has any person by his order,  
 or to this deponent's knowledge or belief, for his use had or re-  
 ceived any manner of security for said debt whatever. And this  
 deponent further says, that this deposition cannot be made by  
 the claimant in person because .....  
 .....  
 and that he is duly authorized by his principal to make this affi-  
 davit, and that it is within his knowledge that the aforesaid debt  
 was incurred as and for the consideration above stated, and that  
 such debt, to the best of his knowledge and belief, still remains  
 unpaid and unsatisfied.

.....

Subscribed and sworn to before me, this .... day of .....,  
 A. D. 18...

.....,  
 [Official character.]

FORM NO. 36.

Proof of Secured Debt by Agent.<sup>69</sup>

In the District Court of the United States for the ..... District  
 of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

At ....., in said district of ....., on the .... day of .....,  
 A. D. 189.., came ....., of ....., in the county of .....,

<sup>69</sup>. See foot-notes to Form No. 31.

## Proof of Secured Debt by Agent.

[No. 36.]

and State of ....., attorney [*or* authorized agent] of ....., in the county of ....., and State of ....., and made oath, and says that ....., the person by [*or* against] whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to the said ..... in the sum of ..... dollars; that the consideration of said debt is as follows: .....; that no part of said debt has been paid [except .....]; that there are no set-offs or counterclaims to the same [except .....]; and that the only securities held by said ..... for said debt are the following .....; and this deponent further says that this deposition cannot be made by the claimant in person because ..... and that he is duly authorized by his principal to make this deposition, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated.

.....

Subscribed and sworn to before me, this .... day of .....,  
A. D. 18...

.....,

[*Official character.*]



No. 37.]

Affidavit of Lost Bill, or Note.

## FORM NO. 37.

Affidavit of Lost Bill, or Note.<sup>70</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

On this .... day of ....., A. D. 18.., at ....., came .....  
....., of ....., in the county of ....., and State of ....., and  
makes oath and says that the bill of exchange [*or note*], the par-  
ticulars whereof are underwritten, has been lost under the follow-  
ing circumstances, to wit, .....

.....  
.....  
and that he, this deponent, has not been able to find the same;  
and this deponent further says that he has not, nor has the said  
....., or any person or persons to their use, to this  
deponent's knowledge or belief, negotiated the said bill [*or note*],  
nor in any manner parted with or assigned the legal or beneficial  
interest therein, or any part thereof; and that he, this deponent,  
is the person now legally and beneficially interested in the same.

*Bill or note above referred to.*

Date.	Drawer or maker.	Acceptor.	Sum.

.....

Subscribed and sworn to before me, this .... day of .....,  
A. D. 18...

.....,  
[Official character.]

<sup>70</sup>. See foot-notes to Form No. 31.

Order Reducing Claim.

[No. 38.]

FORM NO. 38.

Order Reducing Claim.<sup>71</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

At ....., in said district, on the .... day of ....., A. D. 18..

Upon the evidence<sup>72</sup> submitted to this court upon the claim of ..... against said estate [and, *if the fact be so*, upon hearing counsel thereon], it is ordered, that the amount of said claim be reduced from the sum of ....., as set forth in the affidavit in proof of claim filed by said creditor in said case, to the sum of ....., and that the latter-named sum be entered upon the books of the trustee as the true sum upon which a dividend shall be computed [*if with interest*, with interest thereon from the .... day of ....., A. D. 18..].

.....,

*Referee in Bankruptcy.*

71. See, generally, Section Fifty-seven, ante. Read also § 2 (2), and General Order XXI (6).

72. For forms for petition and notice on an application to reduce or expunge, see Forms Nos. 175 and 176, post.

No. 39.]

Order Expunging Claim.

FORM NO. 39.

Order Expunging Claim.<sup>78</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy.

At ....., in said district, on the .... day of ....., A. D. 18..

Upon the evidence submitted to the court upon the claim of  
..... against said estate [and, *if the fact be so*, upon hearing  
counsel thereon], it is ordered that said claim be disallowed and  
expunged from the list of claims upon the trustee's record in said  
case.

.....,

*Referee in Bankruptcy.*

78. See foot-note to Form No. 38.

## Dividend Sheet.

[No. 40.]

## FORM NO. 40.

**List of Claims and Dividends to be Recorded by Referee and by him  
Delivered to Trustee.<sup>74</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF  .....  <i>Bankrupt .</i>	}	In Bankruptcy.
--	---	----------------

At ....., in said district, on the .... day of ....., A. D. 18..

*A list of debts proved and claimed under the bankruptcy of .....  
with ..... dividend at the rate of ..... per cent this day declared thereon by  
....., a referee in bankruptcy.*

No.	Creditors. [To be placed alphabetically, and the names of all the parties to the proof to be care- fully set forth.]	Sum proved.		Dividend.	
		Dollars.	Cents.	Dollars.	Cents.

.....,

*Referee in Bankruptcy.*

<sup>74</sup>. This form fits into § 39-a (1). As a rule, however, dividend sheets are prepared by the trustee from the files and record-book of the referee. The practice here is somewhat archaic. See Forms Nos. 166 and 168 for use of a part of the form in connection with an order declaring a dividend and ordering it paid and the practice there outlined. Consult also, generally, Sections Thirty-nine and Sixty-five, ante.

No. 41.]

Notice of Dividend.

FORM NO. 41.

Notice of Dividend.<sup>75</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

At ....., on the .... day of ....., A. D. 18..

To .....,

Creditor of ....., bankrupt:

I hereby inform you that you may, on application at my office, ....., on the .... day of ....., or on any day thereafter, between the hours of ...., receive a warrant for the ..... dividend due to you out of the above estate. If you cannot personally attend, the warrant will be delivered to your order on your filling up and signing the subjoined letter.

.....,

*Trustee.*

Creditor's Letter to Trustee.

To .....,

Trustee in bankruptcy of the estate of ....., bankrupt:

Please deliver to ..... the warrant for dividend payable out of the said estate to me.

.....,

*Creditor.*

<sup>75</sup>. This form is an inheritance from the law of 1867. It is rarely used. Consult, generally, Sections Thirty-nine and Fifty-seven, and for the notice now required, Section Fifty-eight. See also § 65 and General Order XXIX.

For notice of final meeting, see Form No. 177, which, by the substitution of the dividend clause in Form No. 178, can be adapted to a notice for the declaration and payment of a dividend. Compare also Forms Nos. 166, 168, and 169.

## FORM No. 42.

**Petition and Order for Sale by Auction of Real Estate.<sup>76</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

Respectfully represents ....., trustee of the estate of said bankrupt, that it would be for the benefit of said estate that a certain portion of the real estate of said bankrupt, to wit: [*here describe it and its estimated value*] should be sold by auction, in lots or parcels, and upon terms and conditions, as follows: .....

Wherefore he prays that he may be authorized to make sale by auction of said real estate as aforesaid.

Dated this .... day of ....., A. D. 18..

.....,

*Trustee.*

The foregoing petition having been duly filed, and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing* ..... in favor of said petition and ..... in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's real estate specified in the fore-

<sup>76</sup>. Read Section Seventy, ante, and consult General Order XVIII on sales. See also for notice § 58-a (4) and the sale clause in Form No. 178, when inserted, as there explained, in Form No. 177.

It is also suggested that an

adaptation of this form to the framework of Forms Nos. 185 and 186, or if after notice, to Forms Nos. 185 and 187, will be more in accord with modern methods and the practice outlined in the law and the general orders.

No. 43.]      Petition and Order for Redemption from Lien.

going petition, by auction, keeping an accurate account of each lot or parcel sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this .... day of ....., A. D. 189...

.....,  
*Referee in Bankruptcy.*

FORM NO. 43.

**Petition and Order for Redemption of Property from Lien.<sup>77</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

Respectfully represents ..... , trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*Here describe the estate or property and its estimated value*] is subject to a mortgage [*describe the mortgage*], or to a conditional contract [*describing it*], or to a lien [*describe the origin and nature of the lien*], [or if the property be personal property, has been pledged or deposited and is subject to a lien] for [*describe the nature of the lien*], and that it would be for the benefit of the estate that said property should be redeemed and discharged from the lien thereon. Wherefore he prays that he may be empowered to pay out of the assets of said estate in his hands the sum of ....., being the amount of said lien, in order to redeem said property therefrom.

Dated this .... day of ....., A. D. 18..

.....,  
*Trustee.*

The foregoing petition having been duly filed and having come

<sup>77</sup>. The redemption of property present law. This form, however, fits from liens is not common under the into General Order XXVIII, which

Petition and Order for Sale Subject to Lien.

[No. 44.]

on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or after hearing* ..... in opposition thereto], it is ordered that the said trustee be authorized to pay out of the assets of the bankrupt's estate specified in the foregoing petition the sum of ....., being the amount of the lien, in order to redeem the property therefrom.

Witness my hand this ..... day of ....., A. D. 189..

.....,

*Referee in Bankruptcy.*

FORM NO. 44.

**Petition and Order for Sale Subject to Lien.<sup>78</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

Respectfully represents ....., trustee of the estate of said bankrupt, that a certain portion of said bankrupt's estate, to wit: [*Here describe the estate or property and its estimated value*] is subject to a mortgage [*describe mortgage*], or to a conditional contract [*describe it*], or to a lien [*describe the origin and nature of the lien*], or [*if the property be personal property*] has been pledged or deposited and is subject to a lien for [*describe the nature of the lien*], and that it would be for the benefit of the said estate that said property should be sold, subject to said mortgage, lien, or other incumbrance. Wherefore he prays that he may be

is an inheritance from the law of 1867. See, generally, Sections Twenty-seven and Sixty-seven. As to notice, see § 58-a (7). See also foot-note to Form No. 42.

<sup>78</sup> See foot-notes to Forms Nos. 42 and 43.



No. 45.]

Petition and Order for Private Sale.

authorized to make sale of said property, subject to the incumbrance thereon.

Dated this .... day of ....., A. D. 189..

.....,

*Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ..... in favor of said petition and ..... in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, by auction [*or*, at private sale], keeping an accurate account of the property sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this .... day of ....., A. D. 189..

.....,

*Referee in Bankruptcy.*

FORM No. 45.

**Petition and Order for Private Sale.<sup>79</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

Respectfully represents ....., duly appointed trustee of the estate of the aforesaid bankrupt.

That for the following reasons, to wit,.....

.....

.....

<sup>79</sup>. See sections of the statute and 44. See also General Order Sections of this work, referred to in XVIII (2). the foot-notes to Forms Nos. 42, 43,

Petition, etc., for Sale of Perishable Property.

[No. 46.]

it is desirable and for the best interest of the estate to sell at private sale a certain portion of the said estate, to wit:.....

Wherefore he prays that he may be authorized to sell the said property at private sale.

Dated this .... day of ....., A. D. 189..

.....,

*Trustee.*

The foregoing petition having been duly filed and having come on for a hearing before me, of which hearing ten days' notice was given by mail to creditors of said bankrupt, now, after due hearing, no adverse interest being represented thereat [*or* after hearing ..... in favor of said petition and ..... in opposition thereto], it is ordered that the said trustee be authorized to sell the portion of the bankrupt's estate specified in the foregoing petition, at private sale, keeping an accurate account of each article sold and the price received therefor and to whom sold; which said account he shall file at once with the referee.

Witness my hand this .... day of ....., A. D. 189..

.....,

*Referee in Bankruptcy.*

FORM NO. 46.

**Petition and Order for Sale of Perishable Property.<sup>80</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

Respectfully represents ..... the said bankrupt, [*or*, a creditor, *or* the receiver, *or* the trustee of the said bankrupt's estate].

<sup>80</sup>. See foot-notes to Forms Nos. 42, 43, 44, and 45. and, as to sales of perishable property generally, Sections Fifty-eight and Seventy, ante, and General Order XVIII (3).

No. 47.] Trustee's Report of Exempted Property.

That a part of the said estate, to wit,.....  
 .....  
 .....  
 now in ....., is perishable, and that there will be loss if the same  
 is not sold immediately.

Wherefore he prays the court to order that the same be sold  
 immediately as aforesaid.

Dated this .... day of ....., A. D. 189..

.....

The foregoing petition having been duly filed and having come  
 on for a hearing before me, of which hearing ten days' notice was  
 given by mail to the creditors of the said bankrupt, [*or* without  
 notice to the creditors], now, after due hearing, no adverse interest  
 being represented thereat, [*or* after hearing ..... in favor  
 of said petition and ..... in opposition thereto] I find that  
 the facts are as above stated, and that the same is required in the  
 interest of the estate, and it is therefore ordered that the same be  
 sold forthwith and the proceeds thereof deposited in court.

Witness my hand this .... day of ....., A. D. 189..

.....,

*Referee in Bankruptcy.*

FORM NO. 47.

**Trustee's Report of Exempted Property.<sup>81</sup>**

In the District Court of the United States for the ..... District  
 of .....

IN THE MATTER OF  .....  <i>Bankrupt .</i>	}	In Bankruptcy.
--	---	----------------

At ....., on the ..... day of ....., 18..

The following is a schedule of property designated and set apart  
 to be retained by the bankrupt aforesaid, as his own property,

<sup>81</sup>. See, generally, Sections Six, sult also §§ 2 (11) and 70-b of the  
 Seven, and Forty-seven, ante. Con- statute. This form fits into General

## Trustee's Return of No Assets.

[No. 48.]

under the provisions of the acts of Congress relating to bankruptcy.

General head.	Particular description.	Value.	
Military uniform, arms, and equipments..... Property exempted by state laws(2).....		Dolls:	Cts.

.....,

*Trustee.*

## FORM NO. 48.

Trustee's Return of No Assets.<sup>82</sup>

In the District Court of the United States for the ..... District of .....

<p>IN THE MATTER OF</p> <p>.....</p> <p><i>Bankrupt .</i></p>	<p>In Bankruptcy.</p>

At ....., in said district, on the .... day of ....., A. D. 18..

On the day aforesaid, before me comes ....., of ....., in the county of ..... and State of ....., and makes oath and says that he, as trustee of the estate and effects of the above-named bankrupt, neither received nor paid any moneys on account of the estate.

Subscribed and sworn to before me at ....., this .... day of ....., A. D. 18..

.....,

*Referee in Bankruptcy.*<sup>83</sup>

Order XVII, but should be verified and specify the state statute under which the exemptions are set apart. For other useful forms on exemptions, see Nos. 109, 110, 111, and 112.

<sup>82.</sup> Consult, generally, Section Forty-seven; also General Order

XVII. See also, for the other forms for trustees' reports, Forms Nos. 165 and 167.

<sup>83.</sup> This return should be signed by the trustee and verified, but not necessarily before the referee; see § 20.



## FORM NO. 50.

**Oath to Final Account of Trustee.<sup>85</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

} In Bankruptcy.

*Bankrupt .*

On this .... day of ....., A. D. 18.., before me comes .....  
....., of ....., in the county of ..... and State of ....., and  
makes oath, and says that he was, on the .... day of ....., A. D.  
18. ., appointed trustee of the estate and effects of the above-named  
bankrupt, and that as such trustee he has conducted the settlement  
of the said estate. That the account hereto annexed, containing ....  
sheets of paper, the first sheet whereof is marked with the letter  
.... [*reference may here also be made to any prior account filed by  
said trustee*] is true, and such account contains entries of every  
sum of money received by said trustee on account of the estate  
and effects of the above-named bankrupt , and that the payments  
purporting in such account to have been made by said trustee  
have been so made by him. And he asks to be allowed for said  
payments and for commission and expenses as charged in said  
accounts.

.....,  
*Trustee.*

Subscribed and sworn to before me, at ....., in said .... dis-  
trict of ....., this .... day of ....., A. D. 18..

.....,  
[*Official character.*]

85. This form seems hardly neces-  
sary, save when used as suggested  
in the foot-note to Form No. 49.

See the practice outlined in Forms  
Nos. 167 and 168.

Nos. 51, 52.] Order Discharging Trustee; Petition for Removal of Trustee.

FORM NO. 51.

Order Allowing Account<sup>86</sup> and Discharging Trustee.

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p style="text-align: center;">.....</p> <p style="text-align: right; padding-right: 20px;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
---	---	----------------

The foregoing account having been presented for allowance, and having been examined and found correct, it is ordered that the same be allowed, and that the said trustee be discharged of his trust.

.....,  
*Referee in Bankruptcy.*

FORM NO. 52.

Petition for Removal of Trustee.<sup>87</sup>

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p style="text-align: center;">.....</p> <p style="text-align: right; padding-right: 20px;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
---	---	----------------

To the Honorable ..... ,

Judge of the District Court of the .... District of ..... :

The petition of ..... , one of the creditors of said bankrupt, respectfully represents that it is for the interest of the estate

<sup>86</sup>. When the practice outlined in Forms Nos. 167 and 168 is followed, this form will not be used. It is to the same effect as a clause in Form No. 168. See Section Forty-seven

and the foot-notes to Forms Nos. 49 and 50.

<sup>87</sup>. This form fits into General Orders XIII and XVII. Trustees being rarely removed it is not important. See §§ 2 (17), 44 and 46.

## Notice of Petition for Removal of Trustee.

[No. 53.]

of said bankrupt that . . . . ., heretofore appointed trustee of said bankrupt's estate, should be removed from his trust, for the causes following, to wit: [*Here set forth the particular cause or causes for which such removal is requested.*]

Wherefore . . . . . pray that notice may be served upon said . . . . ., trustee as aforesaid, to show cause, at such time as may be fixed by the court, why an order should not be made removing him from said trust.

. . . . .

## FORM No. 53.

Notice of Petition for Removal of Trustee.<sup>88</sup>

In the District Court of the United States for the . . . . . District  
of . . . . .

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

At . . . . ., on the .... day of . . . . ., A. D. 18..

To . . . . .,

Trustee of the estate of . . . . ., bankrupt:

You are hereby notified to appear before this court, at . . . . ., on the .... day of . . . . ., A. D. 18.., at .. o'clock .. m., to show cause (if any you have) why you should not be removed from your trust as trustee as aforesaid, according to the prayer of the petition of . . . . ., one of the creditors of said bankrupt, filed in this court on the .... day of . . . . ., A. D. 18.., in which it is alleged [*here insert the allegation of the petition*].

. . . . .,

*Clerk.*

88. See foot-note to Form No. 52.



No. 54.]

Order for Removal of Trustee.

## FORM NO. 54.

Order for Removal of Trustee.<sup>89</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

Whereas ..... of ....., did, on the ..... day of ....., A. D. 18.., present his petition to this court, praying that for the reasons therein set forth, ..... the trustee of the estate of said ....., bankrupt, might be removed:

Now, therefore, upon reading the said petition of the said ..... and the evidence submitted therewith, and upon hearing counsel on behalf of said petitioner and counsel for the trustee, and upon the evidence submitted on behalf of said trustee,

It is ordered that the said ..... be removed from the trust as trustee of the estate of said bankrupt, and that the costs of the said petitioner incidental to said petition be paid by said ..... trustee [*or*, out of the estate of the said ....., subject to prior charges].

Witness the Honorable ..... judge of the said court, and the seal thereof, at ....., in said district, on the .... day of ....., A. D. 18..

{ Seal of }  
{ the court. }

.....,

Clerk.

89. See foot-note to Form No. 52.

---

Order, etc., New Trustee; Certificate by Referee to Judge. [Nos. 55, 56.]

---

## FORM NO. 55.

**Order for Choice of New Trustee.<sup>90</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

At ....., on the .... day of ....., A. D. 18..

Whereas by reason of the removal [*or the death or resignation*] of ....., heretofore appointed trustee of the estate of said bankrupt, a vacancy exists in the office of said trustee,

It is ordered that a meeting of the creditors of said bankrupt be held at ....., in ....., in said district, on the .... day of ....., A. D. 18.., for the choice of a new trustee of said estate.

And it is further ordered that notice be given to said creditors of the time, place, and purpose of said meeting, by letter to each, to be deposited in the mail at least ten days before that day.

.....,

*Referee in Bankruptcy.*

## FORM NO. 56.

**Certificate by Referee to Judge.<sup>91</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

I, ....., one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause

<sup>90</sup>. See foot-note to Form No. 52. for the practice under the present

<sup>91</sup>. This form is hardly sufficient law. Now the referee rarely certifies

No. 57.]

Bankrupt's Petition for Discharge.

before me the following question arose pertinent to the said proceedings: [*Here state the question, a summary of the evidence relating thereto, and the finding and order of the referee thereon.*]

And the said question is certified to the judge for his opinion thereon.

Dated at ....., the .... day of ....., A. D. 18..

.....,

*Referee in Bankruptcy.*

FORM No. 57.

Bankrupt's Petition for Discharge.<sup>92</sup>

IN THE MATTER OF

.....

In Bankruptcy.

*Bankrupt .*

To the Honorable .....,

Judge of the District Court of the United States

for the District of .....

....., of ....., in the county of ..... and State of ....., in said district, respectfully represents that on the .... day of ....., last past, he was duly adjudged bankrupt under the acts of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property, and has fully complied with all the requirements of said acts and of the orders of the court touching his bankruptcy.

Wherefore he prays that he may be decreed by the court to have

questions to the judge for decision. It suggests, however, the certificate on review. For certificates for referees in various matters, including reviews, see Forms Nos. 126, 134, 137, 157, 163, 170, 173, in "Supplementary Forms," post. See also §§ 2 (10), 39-a (5) and General Order XXVII. On reviews, consult Section Thirty-nine, ante.

<sup>92</sup>. This form and the "Order of Notice Therein" following it has caused much confusion. The petition itself is within the law (see also General Order XXXI), and if verified

by the bankrupt may be used. But the order, at least in so far as it requires the clerk to send to the creditors copies of the petition, is clearly wrong. See, generally, Sections Fourteen and Fifty-eight, ante. See also suggested "Order to Show Cause," being Form No. 126. For other forms in discharge proceedings, see Forms Nos. 133, 134, 135, 136, 137, 138, 139, 140, 141 and 142 in "Supplementary Forms," post. Consult also §§ 17, 38-a (4) and 58-a (2)-b.

a full discharge from all debts provable against his estate under said bankrupt acts, except such debts as are excepted by law from such discharge.

Dated this .... day of ....., A. D. 189..

.....,

*Bankrupt.*

### Order of Notice Thereon.

District of ....., ss.:

On this .... day of ....., A. D. 189., on reading the foregoing petition, it is—

Ordered by the court, that a hearing be had upon the same on the .... day of ....., A. D. 189., before said court, at ....., in said district, at .... o'clock in the ..... noon; and that notice thereof be published in ....., a newspaper printed in said district, and that all known creditors and other persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of the said petitioner should not be granted.

And it is further ordered by the court, that the clerk shall send by mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

Witness the Honorable ....., judge of the said court, and the seal thereof, at ....., in said district, on the .... day of ....., A. D. 189..

{ Seal of  
the court. }

.....,

*Clerk.*

.... hereby depose, on oath, that the foregoing order was published in the ..... on the following ..... days, viz.:

On the .... day of ..... and on the .... day of ....., in the year 189..

.....

District of .....

....., 189..

Personally appeared ....., and made oath that the foregoing statement by him subscribed is true.

Before me,

.....,

[*Official character.*]

I hereby certify that I have on this .... day of ....., A. D. 189., sent by mail copies of the above order, as therein directed.

.....,

*Clerk.*

Specification of Objection to Discharge; Discharge of Bankrupt. [Nos. 58, 59.]

FORM No. 58.

**Specification of Grounds of Opposition to Bankrupt's Discharge.<sup>93</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt</i> .</p>	}	In Bankruptcy.
---	---	----------------

....., of ....., in the county of ..... and State of  
....., a party interested in the estate of said ..... bankrupt, do hereby oppose the granting to him of a discharge from his debts, and for the grounds of such opposition do file the following specification: [*Here specify the grounds of opposition.*]

.....

*Creditor.*

FORM No. 59.

**Discharge of Bankrupt.<sup>94</sup>**

District Court of the United States,

..... District of .....

Whereas, ..... of ..... in said district, has been duly adjudged a bankrupt, under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said ..... be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the .... day of ....., A. D. 189., on which day the petition for

<sup>93</sup>. This form should have a verification. See, for another form, Form No. 139, post. For grounds of objection to discharge and the practice, consult Section Fourteen,

ante. See also General Order XXXII.

<sup>94</sup>. This differs from the discharge certificate under the law of 1867. The use of this form is universal. For effect, consult Section Fourteen, ante.

Petition for Meeting to Consider Composition.

[No. 60.]

adjudication was filed . . . . . him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable . . . . ., judge of said district court, and the seal thereof this . . . . day of . . . . ., A. D. 189..

{ Seal of  
the court. }

. . . . .,

*Clerk.*

## FORM NO. 60.

**Petition for Meeting to Consider Composition.**<sup>95</sup>

District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy.

To the Honorable . . . . ., Judge of the District Court of the United States for the . . . . District of . . . . .:

The above-named bankrupt respectfully represent that a composition of . . . . . per cent. upon all unsecured debts, not entitled to a priority . . . . . in satisfaction of . . . . debts has been proposed by . . . . to . . . . creditors, as provided by the acts of Congress relating to bankruptcy, and . . . . verily believe that the said composition will be accepted by a majority in number and in value of . . . . . creditors whose claims are allowed.

Wherefore, he pray that a meeting of . . . . creditors may be duly called to act upon said proposal for a composition, according to the provisions of said acts and the rules of court.

. . . . .,

*Bankrupt.*

<sup>95</sup>. This form is never used. It does not fit the practice on composition. See Section Twelve, ante.

No. 61.] Application for Confirmation of Composition.

FORM NO. 61.

**Application for Confirmation of Composition.<sup>96</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt .</i></p>	}	In Bankruptcy.
--	---	----------------

To the Honorable ..... Judge of the District Court of  
the United States for the ..... District of .....

At ....., in said district, on the .... day of ....., A. D. 189..., now comes ....., the above-named bankrupt, and respectfully represents to the court that, after he had been examined in open court [*or* at a meeting of his creditors] and had filed in court a schedule of his property and a list of his creditors, as required by law, he offered terms of composition to his creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the bankrupt to his creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of ..... dollars, has been deposited, subject to the order of the judge, in the ..... National Bank, of ....., a designated depository of money in bankruptcy cases.

Wherefore the said ..... respectfully asks that the said composition may be confirmed by the court.

.....,  
*Bankrupt.*

<sup>96</sup>. This form, when verified by the bankrupt, is sufficient to bring a proposed composition before the court. Consult Section Twelve, generally. See also Forms Nos. 124, 125, 126, 127, 128, 129, 130, 131 and 132 for a complete practice on composition. See also § 58-a (2) and General Order XXXII.

## FORM NO. 62.

**Order Confirming Composition.**<sup>97</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

} In Bankruptcy.

An application for the confirmation of the composition offered by the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited, having been deposited as ordered, in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interest of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy: It is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness the Honorable ..... , judge of said court, and the seal thereof, this .... day of ....., A. D. 189..

{ Seal of  
the court. }

.....,

*Clerk.*

<sup>97</sup>. For another form adapted to a refusal to confirm, and containing also directions for distribution. See Form No. 132, post. Consult Section Twelve, generally.



No. 63.]

Order of Distribution on Composition.

FORM NO. 63.

Order of Distribution on Composition.<sup>98</sup>

UNITED STATES OF AMERICA:

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt* .

} In Bankruptcy.

The composition offered by the above-named bankrupt in this case having been duly confirmed by the judge of said court, it is hereby ordered and decreed that the distribution of the deposit shall be made by the clerk of the court as follows, to wit: 1st, to pay the several claims which have priority; 2d, to pay the costs of proceedings; 3d, to pay, according to the terms of the composition, the several claims of general creditors which have been allowed, and appear upon a list of allowed claims, on the files in this case which list is made a part of this order.

Witness the Honorable ..... , judge of said court, and the seal thereof, this .... day of ....., A. D. 189..

{ Seal of  
the court. }

.....,

*Clerk.*

<sup>98</sup>. It is thought this order should be combined with that confirming the composition. See foot-note to Form No. 62, and compare Form No. 132, post.



# PREFATORY NOTE

TO

## SUPPLEMENTARY FORMS.

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These forms are in no sense official. They are merely suggestions based upon the author's experience. No effort has been made to supply forms for every contingency that may arise in a bankruptcy proceeding; but simply to afford the profession hints as to the more common steps and, largely, where no forms are now available.

The supplementary forms are later indexed in with the official forms and the general orders. For convenience of reference, a list, arranged by the sections of the statute to which they are peculiarly appropriate, is also given.

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# LIST OF SUPPLEMENTARY FORMS.

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## SECTION TWO.

FORM No. 101.—Petition for Appointment of Receiver before Adjudication.

FORM No. 102.—Order Appointing Receiver before Adjudication.

FORM No. 103.—Petition for Appointment of Receiver after Adjudication and Reference.

FORM No. 104.—Order Appointing Receiver after Adjudication and Reference.

FORM No. 105.—Petition for Injunction other than against Suits.

FORM No. 106.—Referee's Stay and Show Cause other than against Suits.

FORM No. 107.—Referee's Order that Writ of Injunction Issue.

FORM No. 108.—Order that Writ of Injunction Issue, after Referee's Stay and Show Cause.

## SECTION SIX.

FORM No. 109.—Order Determining Exemptions when no Trustee Appointed.

FORM No. 110.—Exceptions to Trustee's Report Setting off Exemptions.

FORM No. 111.—Order Determining Exemptions after Trustee's Report.

FORM No. 112.—Petition by Bankrupt for Review of Referee's Order on Exemptions.

## SECTION SEVEN.

FORM No. 113.—Petition for Order Amending Schedules.

FORM No. 114.—Order to Show Cause on Amendment of Schedules.

FORM No. 115.—Order Amending Schedules.

FORM No. 116.—Affidavit to Schedule of Creditors, when Bankrupt cannot to be Found

## SECTION NINE.

FORM No. 117.—Petition for Order of Protection.

FORM No. 118.—Order of Protection.

## SECTION ELEVEN.

FORM No. 119.—Petition for Stay of Pending Suit.

FORM No. 120.—Referee's Stay and Show Cause on Pending Suit.

FORM No. 121.—Stipulation that Show Cause be Heard by Referee.

FORM No. 122.—Decision and Report of Referee on Application for Stay Stipulated before Him.

FORM No. 123.—Order that Writ of Injunction Issue.

List Arranged by Sections.

SECTION TWELVE.

- FORM No. 124.— Offer of Composition.
- FORM No. 125.— Acceptance of Composition.
- FORM No. 125.— Referee's Certificate in Composition.
- FORM No. 127.— Order to Show Cause in Composition.
- FORM No. 128.— Appearance of Objecting Creditor in Composition.
- FORM No. 129.— Specification of Objection in Composition.
- FORM No. 130.— Order of Reference to Special Master in Composition.
- FORM No. 131.— Report of Special Master in Composition.
- FORM No. 132.— Order Confirming (or Refusing to Confirm) Composition.

SECTION FOURTEEN.

- FORM No. 133.— Petition for Extension of Time to Apply for Discharge.
- FORM No. 134.— Referee's Certificate on Application for Extension of Time.
- FORM No. 135.— Order Extending Time to Apply for Discharge.
- FORM No. 136.— Order to Show Cause on Application for Discharge.
- FORM No. 137.— Referee's Certificate of Conformity on Discharge.
- FORM No. 138.— Appearance by Objecting Creditor on Discharge.
- FORM No. 139.— Specification of Objection to Discharge.
- FORM No. 140.— Order of Reference to Special Master on Discharge.
- FORM No. 141.— Report of Special Master on Discharge.
- FORM No. 142.— Order Denying Discharge, after Reference to Special Master.

SECTION EIGHTEEN.

- FORM No. 143.— Voluntary Petition of Partnership, all Partners not Joining.
- FORM No. 144.— Involuntary Petition by Three Creditors.
- FORM No. 145.— Order Directing Service by Publication.
- FORM No. 146.— General Appearance in Involuntary Case.
- FORM No. 147.— Appearance by Intervening Creditor.
- FORM No. 148.— Application for Jury Trial in Involuntary Case.
- FORM No. 149.— General Answer in Involuntary Case.
- FORM No. 150.— Answer Alleging more than Twelve Creditors.
- FORM No. 151.— Order of Reference to Special Master in Involuntary Cases.
- FORM No. 152.— Report of Special Master in Involuntary Case.
- FORM No. 153.— Exceptions to Report of Special Master in Involuntary Case.
- FORM No. 154.— Petition of Petitioning Creditors for Dismissal in Involuntary Case.
- FORM No. 155.— Order to Show Cause on Petition for Dismissal in Involuntary Case.
- FORM No. 156.— Order of Dismissal on Petition of Petitioning Creditors and after Notice in Involuntary Case.

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List Arranged by Sections.

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## SECTION TWENTY-TWO.

FORM No. 157.—Referee's Certificate of Disqualification.

## SECTION TWENTY-FOUR.

FORM No. 158.—Petition to Revise in Matter of Law.

FORM No. 159.—Order of District Court Allowing Petition for Revision in Matter of Law.

FORM No. 160.—Notice to Respondent on Revision.

FORM No. 161.—Order of Circuit Court of Appeals on Revision.

## SECTION THIRTY-NINE.

FORM No. 162.—Petition for Review of Referee's Order.

FORM No. 163.—Referee's Certificate on Review.

## SECTION FORTY-FOUR.

FORM No. 164.—Order Approving Appointment of Trustee.

## SECTION FORTY-SEVEN.

FORM No. 165.—Trustee's First Report.

FORM No. 166.—Order Declaring and Ordering First Dividend Paid.

FORM No. 167.—Trustee's Final Report and Account.

FORM No. 168.—Final Order of Distribution.

FORM No. 169.—Trustee's Combined Dividend Check and Receipt.

## SECTION FORTY-EIGHT.

FORM No. 170.—Referee's Certificate of Fees Payable.

## SECTION FIFTY.

FORM No. 171.—Bond of Trustee, with Justification of Sureties.

FORM No. 172.—Order Approving Trustee's Bond.

## SECTION FIFTY-ONE.

FORM No. 173.—Certificate of Referee as to Falsity of Pauper Affidavit.

## SECTION FIFTY-SEVEN.

FORM No. 174.—Special Clauses for Proofs of Debt (to Conform to General Order XXI).

FORM No. 175.—Petition for Reconsideration and Rejection of Claim.

FORM No. 176.—Notice of Petition for Reconsideration and Rejection of Claim.

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SECTION FIFTY-EIGHT.

- FORM No. 177.— Notice of Final Meeting.  
 FORM No. 178.— Special Clauses for Notices to Creditors.  
 FORM No. 179.— Combined Notice to Creditors.  
 FORM No. 180.— Affidavit of Publication of Notice.  
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SECTION SIXTY-TWO.

- FORM No. 182.— Order Appointing Attorney for Trustee.

SECTION SEVENTY.

- FORM No. 183.— Petition for Instruction as to Burdensome Property.  
 FORM No. 184.— Order on Petition as to Burdensome Property.  
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 FORM No. 186.— Order for Sale under General Order XVIII (2).  
 FORM No. 187.— Order Confirming Sale after Notice to Creditors.

# SUPPLEMENTARY FORMS.

FORM NO. 101.

## Petition for Appointment of Receiver Before Adjudication.<sup>1</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To the Hon. ...., District Judge:

Your petitioners respectfully show:

That their petition for the adjudication of ..... of the  
..... of....., in said district, to be a bankrupt was filed herein  
on the ..... day of ....., 19..; that such proceeding is still  
pending, and will not be determined for some time.

That, as your petitioners are informed and believe, the estate  
of said bankrupt consists of and is worth substantially as follows:<sup>2</sup>

.....

That it is absolutely necessary for the preservation of said estate  
that a receiver be appointed to take charge of the same<sup>3</sup> .....,  
for the following reasons:<sup>4</sup> .....

.....

1. See, generally, Section Two, in whose possession it is and whether  
ante. And compare §§ 3-e and 59 there are any adverse claimants.

2. Here recite the property, under 3. Or a specified part of it, stat-

the two general heads of real and ing it.  
personal, in sufficient detail, showing 4. Here state the reasons, as, for  
instance, (1) that "the bankrupt has



No. 101.]

Petition for Receiver before Adjudication.

That your petitioners file herewith the bond of ..... ,  
in \$. . . . . , as required by § 3-e of the bankruptcy act of 1898.<sup>5</sup>

That<sup>6</sup> it will be for the best interests of said bankrupt and his  
creditors that his business, located at No. . . . . street, in the  
. . . . . of . . . . . , in said district, be continued until the hearing  
and decision on the petition for adjudication herein, for the follow-  
ing reasons: . . . . .

That no previous application has been made to this or any other  
court for the order hereinafter asked.

Wherefore your petitioners pray that ..... , of ..... ,  
in said district, be appointed receiver herein, with power to take  
charge of and hold said estate<sup>6½</sup> and to continue said business, and  
for such other order as shall be just and lawful.

Dated, . . . . . , . . . . . , . . . . . , 19...

..... ,

..... ,

..... ,

*Petitioners.*<sup>7</sup>

STATE OF ..... ,  
County of ..... ,  
City of ..... , } ss.:

I (We), ..... , the petitioner .. mentioned and described  
in the foregoing petition, do hereby (severally) make solemn oath  
that the statements of fact therein contained are true, according  
to the best of my (our) knowledge, information, and belief.

.....

Subscribed and sworn to before me, this .. day of ..... , 19...

..... ,

.....

absconded and abandoned the same;" or (2) that "the bankrupt is selling the same at prices much less than such property is worth, to wit . . . . . , or has threatened or is liable so to do;" or (3) that "the bankrupt is neglecting such property and the same is deteriorating or liable so to do."

5. For bond, see Form No. 9, changing recitals to fit this kind of an application and the condition clause to fit § 3-e.

6. Omit this paragraph if the receiver is to be a custodian only.

6½. Or a specified part of it, stating it.

7. This application can be made

Order Appointing Receiver before Adjudication.

1 No. 102.

## FORM NO. 102.

**Order Appointing Receiver Before Adjudication.<sup>8</sup>**

In the District Court of the United States for the .... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Whereas, a petition for adjudication of bankruptcy was, on the ..... day of ....., 19.., filed against ..... of the ..... of ....., in said district, and said petition is still pending, and whereas it satisfactorily appears that it is absolutely necessary for the preservation of the estate of said bankrupt that a receiver be appointed to take charge of and to hold such estate, and that he continue the business of said bankrupt, and a bond having been filed, as provided in § 3-e of the bankruptcy act of 1898; now, on motion of ....., Esq., attorney for the petitioner,

It is ordered:

That said bond be and the same hereby is approved, both as to its form, sufficiency, and manner of execution.

That ....., of ....., in said district, be, and he hereby is, appointed receiver of the estate of said bankrupt<sup>9</sup> on filing an additional bond as receiver in the sum of \$....., with sufficient sureties, to be approved by this court, and that thereupon such receiver take charge of and hold such estate until further order.

by one petitioner only. If made by attorney, show in affidavit of verification why petition was not made by the creditors.

8. This order follows Form No. 101. See foot-notes to same.

9. Or a specified part of it, stating it.

No. 103.]      Petition for Receiver after Adjudication.

That<sup>10</sup> said receiver continue the business of such bankrupt, at No. . . . . street, in the . . . . . of . . . . ., in said district, until further order.<sup>11</sup>

It is further ordered that, should . . . . . be adjudicated a bankrupt, said receiver continue as such, with the powers herein conferred, until the appointment and qualification of a trustee of said bankrupt.

Witness the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . day of . . . . ., 19...

{ Seal of  
the court. }

. . . . .,

*Clerk.*

FORM NO. 103.

**Petition for Appointment of Receiver After Adjudication and Reference.**<sup>12</sup>

In the District Court of the United States for the . . . District of . . . . .

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: right;"><i>Bankrupt</i> .</p>	}	In Bankruptcy No. ....
--	---	------------------------

To . . . . ., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner was adjudicated a bankrupt herein on the . . . . day of . . . . ., 19.., and on the same day this proceeding was duly referred.

10. Omit this paragraph, if the receiver is to be custodian only.

11. Here add any limitations as, for instance, concerning the borrowing of money, the buying of new goods, etc.

12. This form is chiefly valuable in voluntary cases to protect assets until a trustee can be appointed. It can, of course, be made by a creditor as well as the bankrupt. See, generally, Section Two, ante.

## Petition for Receiver after Adjudication.

[No. 103.]

That your petitioner's estate consists of and is worth substantially as follows:<sup>13</sup> .....

That it is absolutely necessary for the preservation of said estate that a receiver be appointed to take charge of the same, for the following reasons:<sup>14</sup> .....

That<sup>15</sup> it will be for the best interests of your petitioner's creditors that his business, located as above stated, be continued until a trustee can be appointed and qualify, for the following reasons: .....

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays that a receiver may be appointed herein, with<sup>16</sup> power to continue said business, and for such other order as shall be just and lawful.

Dated, ....., ....., ....., ....., 19...

.....,  
*Petitioner.*

STATE OF ....., }  
County of ....., } ss.:  
City of ....., }

I, ....., the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information, and belief.

.....,

Subscribed and sworn to before me, this .... day of ....., 19..

.....,  
.....

**Consent of Creditors.<sup>17</sup>**

We, the undersigned, creditors of said bankrupt, holding unsecured claims in the amounts set opposite our names, do hereby

**13.** Here recite the property under the two general heads of real and personal, in sufficient detail, showing in whose possession it is, and whether there are any adverse claimants.

**14.** Here state the reasons, as, for instance, (1) that "a portion of said estate is perishable, to wit .....,

and should be sold at once;" or (2) that "such property is without protection from theft or the elements, and not insured."

**15.** Omit this paragraph, if the receiver is to be custodian only.

**16.** So also this clause may be omitted.

**17.** While not essential to secure

No. 104.] Order Appointing Receiver after Adjudication:

join in the annexed petition, and do nominate . . . . ., of the . . . . . of . . . . ., in said district, for receiver.

Dated, . . . . ., . . . . ., . . . . ., . . . . ., 19...

. . . . ., \$. . . . .

. . . . ., \$. . . . .

. . . . ., \$. . . . .

FORM NO. 104.

Order Appointing Receiver After Adjudication and Reference.<sup>18</sup>

At a court of bankruptcy, held in and for the .... District of . . . . ., at . . . . ., this .... day of . . . . ., 19...

Present: . . . . ., Esq., Referee.

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

Application having been made for the appointment of a receiver herein, and that he be given power to continue the business of the bankrupt, and . . . . . creditors, in a total of \$. . . . ., having joined in such application and nominated . . . . ., to be such receiver; now, on motion of . . . . ., Esq., attorney for said . . . . .

It is ordered:

That . . . . ., of the . . . . . of . . . . ., in said district, be, and he hereby is, appointed receiver of the estate of said bankrupt, on filing a bond in the sum of \$. . . . ., with sufficient sureties, to be approved by this court.

That<sup>19</sup> said receiver continue the business of said bankrupt, at No. . . . . street, in the . . . . . of . . . . ., in said district.

the consent of creditors, the practice is advised. See "Practice" on receiverships in Section Two, ante.

18. This form follows Form No. 103. See foot-notes to same.

19. Omit this paragraph, if receiver is to be custodian only.

Petition for Injunction other than Against Suits. [No. 105.]

That<sup>20</sup> said receiver have power also to .....

That said receiver continue as such until the appointment and qualification of a trustee herein.

.....,

*Referee in Bankruptcy.*

FORM NO. 105.

**Petition for Injunction other than Against Suits.<sup>21</sup>**

In the District Court of the United States for the .... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

To ....., Esq.,<sup>22</sup> Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the receiver<sup>23</sup> herein.

That the above-named bankrupt was duly adjudged herein on the  
.... day of ....., 19.., and, thereafter, the following proceedings  
were had:<sup>24</sup> .....

That<sup>25</sup> .....  
.....

**20.** Use only when the receiver is given special powers.

**21.** For the validity of injunctions granted by referees, see, generally, Sections Two, Eleven and Thirty-eight. Read also General Order XII, which, however, refers only to injunctions against proceedings or officers. See also *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224.

**22.** If before adjudication, address to the judge.

**23.** Or "the bankrupt;" or "the trustee;" or "a creditor of the bankrupt."

**24.** Recite the previous steps in the proceeding briefly.

**25.** Here give the name and residence of the person sought to be enjoined, and the facts making the injunction necessary, as an imminent sale on a foreclosure where the equity of redemption is substantial; or, the giving of a voidable preference as defined in § 60, and proceedings by the creditor preferred which may result in the property getting into the hands of an innocent holder for value, in this case specifying whether or not the property is in the posses-

No. 106.] Referee's Stay, etc., other than Against Suits.

That, unless the injunction hereinafter asked is granted, your petitioner and the creditors of said bankrupt will suffer irreparable injury.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays for a writ of injunction herein, forbidding the said . . . . ., his attorneys, agents, and servants, from<sup>26</sup> . . . . . and for such other order as shall be just and lawful.

Dated, . . . . ., 19...

. . . . .,  
Petitioner.

[Add verification as in Form No. 103.]

FORM NO. 106.

Referee's Stay and Show Cause other than Against Suits.<sup>27</sup>

At a Court of Bankruptcy, held in and for the . . . . . District of . . . . ., at . . . . ., this . . . . day of . . . . ., 19...

Present: . . . . ., Esq., Referee.

IN THE MATTER OF

. . . . . } In Bankruptcy No. ....

*Bankrupt .*

Application having been made for a writ of injunction directed to . . . . ., of the . . . . . of . . . . ., in said district, re-

sion of the bankrupt or an adverse claimant, and, if the latter, by what kind of a transfer and with what notice, if any, of the bankruptcy he holds. See, generally, "Injunctions other than against Suits," in Section Two, ante, and cases cited.

<sup>26</sup>. Here state briefly the acts or transactions which the petitioner seeks to prevent.

<sup>27</sup>. The referee may, it is thought, grant an injunction without a show cause. See *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, and consult generally "Injunctions other than against Suits" in Section Two, ante. If a show cause is not thought necessary use Form No. 107, or if the local practice does not call for the issuance of the writ of injunction,

Referee's Stay, etc., other than Against Suits.

[No. 106.]

straining him from<sup>28</sup> .....  
 .....  
 and it appearing that the same should be heard and decided by the  
 judge, and that the said ..... be so restrained meanwhile;  
 now, on motion of ..... Esq., attorney for .....  
 the petitioner,

It is ordered:

That ..... his attorneys, agents, and servants, be, and  
 they are and each of them is hereby restrained and enjoined from<sup>29</sup>  
 ..... until the hearing and deci-  
 sion of the show cause hereinafter ordered.

That the said ..... show cause, before the Hon.  
 ..... District Judge, at the United States District Court  
 Room, in the ..... of ..... in said district, on the .... day  
 of ....., 19.., at .... o'clock, .. M., or as soon thereafter as  
 counsel can be heard, why a writ of injunction should not issue  
 out of said court restraining and enjoining him, the said .....  
 ....., from<sup>29</sup> ..... forever.<sup>30</sup>

Let service of this order on the said<sup>31</sup> ..... by de-  
 livery to him personally of a copy of the same and of the petition  
 on which it is granted within .... days previous to the day last  
 hereinbefore mentioned, be sufficient.<sup>32</sup>

.....,

*Referee in Bankruptcy.*

draw a referee's order restraining  
 and enjoining the person named as  
 suggested by the words of this form.

28. Make this recital fit the prayer  
 of the petition.

29. Here state the acts or trans-  
 actions which are enjoined.

30. Or until a time certain, specify-  
 ing it, or "until further order."

31. Or "on ....., Esq., his at-  
 torney of record," if any; or "on  
 either or both the said ..... and  
 ....., his attorney," as the court  
 may direct.

32. Service should never be by  
 mail, or on any person other than  
 here specified.



No. 107.] Referee's Order that Writ of Injunction Issue.

FORM NO. 107.

Referee's Order that Writ of Injunction Issue.<sup>33</sup>

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

*Bankrupt .*

In Bankruptcy No. ....

Application having been made for a writ of injunction directed to ..... of the ..... of ....., in said district, restraining him from<sup>34</sup> .....; and it appearing that the same should be granted by the referee and not by the judge;<sup>35</sup> on motion of ..... Esq., attorney for .....<sup>36</sup> and ..... Esq., also appearing for the said ..... and objecting thereto (or consenting),

It is ordered:

That a writ of injunction issue out of said court, and under its seal, and tested by its clerk,<sup>37</sup> restraining and enjoining the said ..... his attorneys, agents, and servants from<sup>38</sup> ....., forever.<sup>39</sup>

That, until such writ shall issue, the said ....., his attorneys, agents, and servants, be and they hereby are restrained and enjoined from the doing of said acts.

.....

*Referee in Bankruptcy.*

33. See foot-note 27, Form No. 106.

34. See foot-note 28, to same form.

35. If brought on before the referee by stipulation (see Form No. 121) strike out this clause and substitute for it, "and the same being now moved by stipulation before the referee instead of before the judge."

36. Strike out to end of paragraph if there is no appearance in opposition.

37. See General Order III.

38. Here state the acts or transactions enjoined.

39. Or until a time certain, specifying it, or "until further order."

Order that Writ of Injunction Issue.

[No. 108.]

## FORM NO. 108.

**Order that Writ of Injunction Issue, After Referee's Stay and Show Cause.<sup>40</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Whereas, application has been previously made for a writ of injunction directed to ..... of the ..... of ..... in said district, and a temporary injunction was granted thereon by ..... Esq., referee in bankruptcy of this court, and the said ..... required to show cause in this court why the same should not be continued forever,<sup>41</sup> and such show cause being this day moved by ..... Esq., attorney for the petitioner, and<sup>42</sup> after hearing ..... Esq., attorney for said ..... opposed;

It is ordered:<sup>43</sup> that a writ<sup>44</sup> of injunction issue out of this court, under its seal and tested by its clerk, restraining and enjoining the said ..... and his attorneys, agents, and servants, from<sup>45</sup> ..... forever.<sup>46</sup>

Witness, the Honorable ..... Judge of the said court, and the seal thereof, at the city of ..... in said district, on the .... day of ....., 19...

{ Seal of  
the court. }

.....,

*Clerk.*

40. To be used only in cases where the referee grants a temporary injunction with show cause. See Form No. 106 and foot-note 27. Compare also Form No. 107.

41. Or recite the duration of the injunction as shown in the referee's order.

42. Strike out to end of paragraph if there is no appearance in opposition.

43. If application is denied, strike out balance of form and add: "That such application be and the same hereby is denied, and such temporary injunction herein is vacated."

44. For form of writ, see works on Federal Practice.

45. Here state the acts or transactions enjoined.

46. See foot-note 41.

No. 109.] Order Determining Exemptions, no Trustee.

FORM NO. 109.

**Order Determining Exemptions When no Trustee Appointed.<sup>47</sup>**

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

} In Bankruptcy No. ....

An order having been entered herein dispensing with a trustee, as provided in General Order XV; and it appearing, from the affidavit of the bankrupt filed on this application and Schedule B (5) filed with his petition herein, that he has duly claimed and is entitled to the exemptions hereinafter mentioned; now, on motion of ....., Esq., his attorney,

It is ordered that the said bankrupt's claim to exemptions be determined as follows:

That he is entitled, under ..... of the laws of the State of ....., to the following property:<sup>48</sup> .....

and that the same be delivered to him forthwith.

.....,

*Referee in Bankruptcy.*

<sup>47</sup>. Consult, generally, Sections Six and Forty-seven. And see General Order XV and Form No. 27. See also §§ 2 (11), 38 (4). Forms Nos. 110, 111, 112 should also be noted.

<sup>48</sup>. Here say "that claimed by him in his said Schedule B (5)," or, if all of same are not set off to him, specify those that are set off.

Exceptions to Trustee's Report on Exemptions.

[No. 110.]

## FORM NO. 110.

**Exceptions to Trustee's Report Setting off Exemptions.<sup>49</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

Now comes ....., of ....., a creditor of the above-named bankrupt,<sup>50</sup> and excepts to the trustee's report setting off said bankrupt's exceptions, filed herein on the .... day of ....., 19..<sup>51</sup> in that such report<sup>52</sup> sets off to said bankrupt the following:<sup>53</sup> .....  
.....  
for the following reasons:<sup>54</sup> .....

and prays that a hearing may be had upon such exceptions and that the same may be argued, as provided in General Order XVII.

Dated, ....., ....., ....., ....., 19...

.....,

*Excepting Creditor.*<sup>55</sup>

49. See, generally, Sections Six and Forty-seven, and for trustee's report on exemptions, Form No. 47, which, however, it is thought, should be verified and should specify the state statute under which the exemptions are set apart. The practice on exceptions will be found in General Order XVII. If the bankrupt is the party aggrieved he must ask a review. See Form No. 112.

50. If the exceptions are made by attorney add: "by ....., of the ..... of ....., in said district, his attorney, duly authorized to that end." For the authority required if the exceptions are not filed by a creditor, see § 1 (9).

51. Or, if the exceptions are to the referee's order, strike out this clause and substitute: "and excepts to the order of ....., Esq., referee in bankruptcy herein, determining said bankrupt's claim to exemptions, entered on the .... day of ....., 19..."

52. "Or order," as the case may be.

53. Here copy in the set-off objected to, or phrase it in words so that the exception will be clearly indicated.

54. Here insert words showing the error excepted to.

55. If by an attorney, add "by ....., his attorney, address No. ...., ....., ....."

No. III.1      Order Determining Exemptions After Report.

FORM NO. III.

**Order Determining Exemptions After Trustee's Report.<sup>56</sup>**

At a Court of Bankruptcy, held in and for the ..... Dis-  
trict of ....., at ....., this .... day of .....,  
19...

Before ....., Esq., Referee:

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

The trustee herein having, more than twenty days since, filed his report of exempted property, in accordance with General Order XVII, and no exceptions having been taken thereto,<sup>57</sup> now, on motion of ....., Esq., attorney for said bankrupt,

It is ordered:

That said trustee's report of exempted property be, and the same hereby is, in all things confirmed,<sup>58</sup> and the bankrupt's claim to exemptions is hereby determined accordingly.

That the property specified in such report be delivered to said bankrupt forthwith.

.....,

*Referee in Bankruptcy.*

<sup>56</sup>. See foot-note 49. This form can also easily be changed to fit a case where exceptions have been taken (Form No. 110) and argued.

<sup>57</sup>. If exceptions have been taken, change to fit the facts; if the report of the trustee is not to be confirmed

in whole or in part, here give the reasons.

<sup>58</sup>. Or, in case such report is not confirmed, in whole or in part, stop here and insert words indicating the decision.

Petition for Review on Exemptions.

[No. 112.]

## FORM NO. 112.

**Petition by Bankrupt for Review of Referee's Order on Exemptions.<sup>59</sup>**

In the District Court of the United States for the .... District  
of .....,

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was adjudged a bankrupt herein on the .... day of  
....., 19.., and that a trustee of his estate was in such proceed-  
ing subsequently appointed.

That such trustee, on the .... day of ....., 19.., filed a report  
of exempted property herein, and that, on the .... day of .....,  
19.., an order was entered determining your petitioner's claim to  
exempt property, as stated in such report.<sup>60</sup> .....

.....<sup>61</sup>

That such order was erroneous, for the following reasons:<sup>62</sup>

.....

Wherefore, your petitioner, feeling aggrieved because of said  
order, prays that said trustee's report and the said order be re-  
viewed, as provided in the bankruptcy law of 1898 and General  
Order XXVII.

Dated, ....., ....., 19...

.....,

*Bankrupt.*

[Add verification as in Form No. 103.]

<sup>59</sup> If granted, for Referee's Certificate on Review, see Form No. 163. See, generally, for practice on reviews, Section Thirty-nine, ante. A creditor can, of course, ask for a review. If so, see Forms Nos. 162 and 163.

<sup>60</sup> If confirmation was refused

either in whole or in part here state the substance of the referee's order.

<sup>61</sup> Or, if the referee's order modified the trustee's report, strike out "as stated in such report," and substitute "as follows: ....."

<sup>62</sup> Here indicate the reasons constituting the error complained of.

No. 113.]

Petition for Order Amending Schedules.

FORM NO. 113.

**Petition for Order Amending Schedules.<sup>63</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To ..... Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was duly adjudicated a bankrupt herein on the .... day of ....., 19..., and that his schedules, as required by § 7 (8) of the bankruptcy law of 1898, have been duly filed herein.

That the first meeting of your petitioner's creditors has been called for<sup>64</sup> the .... day of ....., 19...

That, at the time your petitioner's schedule of creditors was prepared, by inadvertence,<sup>65</sup> the names and the statutory facts concerning the claims of certain creditors were omitted therefrom.<sup>66</sup>

That such names and facts are as follows:<sup>67</sup> .....

That<sup>68</sup> the above-mentioned creditors have not been regularly notified of said first meeting of creditors.

63. This petition can be adapted to a case where the petition and not the schedules needs amendment. See Section Eighteen, ante. Compare, generally, General Order XI, and Sections Seven and Eighteen.

64. If the meeting has been held, change to fit the facts.

65. Or give any other reason bringing the case within General Order XI.

66. Or state what was the act or

omission which makes the amendment necessary.

67. If an amendment of Schedule A is desired, give the name of the creditor, his residence, when and where the debt was contracted, and its consideration and amount, and if secured, etc., with the same particularity required by the appropriate page of Schedule A of Form No. 1.

68. Omit this, if notice has been sent them.

## Order to Show Cause on Amendment.

[No. 114.]

That,<sup>69</sup> at the time your petitioner's schedule of property was prepared, by inadvertence, a certain interest in property vested in your petitioner was omitted therefrom, namely:<sup>70</sup> .....

That no previous application has been made for the order hereinafter asked.

Wherefore, your petitioner prays for an order amending said schedules in the particulars above specified,<sup>71</sup> and that notice be given accordingly.

Dated at ....., ....., ....., .., 19...

[Add verification as in Form No. 103.]

.....,  
Petitioner.

## FORM NO. 114.

Order to Show Cause on Amendment of Schedules.<sup>72</sup>

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. —.

On reading and filing the petition of ....., the bankrupt herein, wherein he prays for an order amending his schedules in certain particulars, now, on motion of ....., Esq., his attorney,

It is ordered:

That the creditors hereinafter named show cause before the undersigned, at ....., in the ..... of ....., in said district, on

<sup>69</sup>. Use this paragraph only when the amendment of Schedule B is desired. the appropriate page of Schedule B of Form No. 1.

<sup>70</sup>. Here give a sufficient description to show all the facts required by

<sup>71</sup>. If notice has been given, stop here.

<sup>72</sup>. This form fits into Form No. 113. See foot-note 63 to same.



No. 115.]

Order Amending Schedules.

the .... day of ....., 19.., at ..... o'clock, .. M., or as soon thereafter as counsel can be heard, why the prayer of said petition should not be granted and why said petitioner's schedules, herein-after mentioned, should not be amended by adding to Schedule A .....<sup>73</sup> the names and facts hereinafter set forth:<sup>74</sup> ..... and<sup>75</sup> by adding to Schedule B .....<sup>76</sup> the following statement of facts as to property:<sup>77</sup> .....

Let service of this order be made by mail, addressed to said persons at their places of residence as above stated, not later than ten days prior to the return day hereof.<sup>78</sup>

.....,

*Referee in Bankruptcy.*

FORM NO. 115.

Order Amending Schedules.<sup>79</sup>

At a Court of Bankruptcy, held in and for the .....  
District of ....., at ....., on the .... day of .....,  
19...

Present: ..... Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Application having been heretofore made for an order amending Schedule<sup>80</sup> ....., previously filed herein, and an order to show

<sup>73</sup>. Here insert (1), (2), (3), (4), or (5), dependent on the page of Schedule A sought to be amended.

<sup>74</sup>. See foot-note 66, Form No. 113.

<sup>75</sup>. See foot-note 69, Form No. 113.

<sup>76</sup>. Here insert (1), (2), (3), (4), (5), or (6), dependent on the page of Schedule B sought to be amended.

<sup>77</sup>. See foot-note 70, Form No. 113.

<sup>78</sup>. If Schedule B only is to be amended, notice should be given the

trustee, and this paragraph changed accordingly.

<sup>79</sup>. This order should be in triplicate, one for the clerk, one for the trustee, and one for the referee. Compare Forms Nos. 113 and 114. See also, generally, Sections Seven and Eighteen, ante, and General Order XI.

<sup>80</sup>. Here insert, for instance, "A (3)" or "B (2)," to fit the petition.

Affidavit to Schedule, Bankrupt Absent.

[No. 116.]

cause having been granted thereon on the .... day of .....,  
19.., and proof of mailing said order, as provided therein, now  
being made, and<sup>81</sup> .....

now, on motion of ....., Esq., attorney for said bankrupt,  
It is ordered:

That Schedule A ( )<sup>82</sup> herein be amended by adding thereto,  
in the proper columns, the following facts:<sup>83</sup> .....

That<sup>84</sup> Schedule B ( ) be amended by adding thereto the fol-  
lowing words:<sup>85</sup> .....

.....,  
*Referee in Bankruptcy.*

FORM NO. 116.

**Affidavit to Schedule of Creditors When Bankrupt Cannot be Found.<sup>86</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

..... } In Bankruptcy No. ....  
*Bankrupt .*

STATE OF ....., }  
County of ....., } ss.:  
City of ....., }

....., of ....., being severally duly sworn, depose  
and say that they<sup>87</sup> are the petitioning creditors in the above pro-

81. Recite whether there was ap-  
pearance in opposition, and if so by  
what creditor or the trustee, and by  
what attorney represented.

82. See foot-note 80.

83. Indicate the columns on the  
appropriate page of Schedule A by  
numeral as if in Schedule A (3) thus:  
(1) page 25, (2) John Smith, (3) 650  
Broadway, New York, (4) New York,  
(5) Merchandise, (6) \$5,203.69."

84. Use only if Schedule B is to  
be amended.

85. See foot-note 83, and indicate  
columns of appropriate page of  
Schedule B, as there indicated.

86. This practice is outlined in  
General Order IX. See also Sec-  
tions Seven and Thirty-nine.

87. One petitioner acquainted with  
the facts can make this affidavit; if so  
change the form accordingly.

No. 116.]

Affidavit to Schedule, Bankrupt Absent.

ceeding; that the said . . . . . , the bankrupt, is absent from the said district and cannot be found; that your petitioners have diligently inquired into his affairs for the purpose of ascertaining the names and places of residence of all of his creditors, and, according to the best of their information, such names and places of residence are set out in Schedule A, hereto annexed.

. . . . .  
 . . . . .  
 . . . . .  
 . . . . .

Subscribed and sworn to before me, this . . . . day of . . . . , 19. . .

. . . . .  
 . . . . .

**SCHEDULE A.<sup>88</sup>**

**Unsecured Creditors.**

Names.	Residences.	Amounts.	
		Dolls.	Cts.

**Creditors Holding Securities.**

Names.	Residences.	Securities.	Values.		Amounts.	
			Dolls.	Cts.	Dolls.	Cts.

**88.** Attach this schedule to the affidavit, filling in names, residences, amounts, etc., with as much accuracy as possible.

Petition for Order of Protection.

[No. 117.]

FORM NO. 117.

Petition for Order of Protection.<sup>89</sup>

In the District Court of the United States for the .... District  
of .....,

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he was adjudicated bankrupt herein on the .... day of  
....., 19.., and on the same day his proceeding in bankruptcy  
was duly referred.

That your petitioner has not yet made application for his discharge herein.

That your petitioner has reason to believe that he is liable to arrest upon civil process, other than in the cases specified in § 9-a of the bankruptcy law of 1898.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays for an order of protection from arrest, as provided in said § 9-a and General Order XII (1).

Dated, ....., ....., 19...

.....,

*Petitioner.*

[Add verification as in Form No. 103.]

<sup>89</sup>. See, generally, Section Nine, ante. Consult also General Order XII (1). The application often takes the form of a petition for an injunction against further proceedings in a suit, on the theory that a body execution is a step in a suit. See Forms Nos. 119, 120, 121, 122, 123.

No. 125.]

Acceptance of Composition.

and property have been previously filed at ....., with ....., Esq., the referee in bankruptcy in charge, and who was examined in open court herein on the .... day of ....., 19.,<sup>18</sup> does hereby offer a composition at ..... per cent. (....%) of the claims of his creditors, allowed or to be allowed, except those entitled to priority, in this proceeding.

This<sup>19</sup> offer is to be effective only after the examination of the undersigned in open court, as provided in § 12-a of the bankruptcy law of 1898.

Dated, ....., ....., 19...

STATE OF .....,  
County of ....., } ss.:  
City of ....., }

.....,  
*Bankrupt.*

On this .... day of ....., 19., the above-named ..... appeared before me and acknowledged the execution of the foregoing offer of composition.

.....,  
.....

FORM No. 125.

**Acceptance of Composition.<sup>20</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

To ....., Esq., Referee in Bankruptcy, and the bankrupt above named:

The undersigned creditors, whose signatures, residences, claims, and the amount at which the same have been allowed, are hereafter

18. If the examination has not been held but is to be, specify the date and then use the paragraph referred to in foot-note 19.

19. Omit this if the bankrupt has already been examined.

20. See foot-notes to Form No. 124, and consult, generally, Section Twelve.

## Acceptance of Composition.

[No. 125.]

set out, do hereby accept the offer of composition at ..... per cent. (....%) made herein by ..... , the above-named bankrupt, on the .... day of ....., 19..; this<sup>21</sup> acceptance, however, to be effective only after such bankrupt shall be examined in open court.

Dated, ....., .., ....., 19...

Signatures of creditors, <sup>22</sup>	Residences.	Debts allowed.	
		Dolls.	Cts.

STATE OF .....,  
 County of .....,  
 City of .....,

} ss.:

On this .... day of ....., 19.., the above-named .....  
 ..... and .....  
 ..... and .....  
 appeared before me and severally acknowledged the execution of  
 the foregoing acceptance of offer of composition.

.....,

.....

<sup>21</sup>. Strike this clause out if bankrupt has already been examined.

<sup>22</sup>. The creditors should sign here, using their business names, and, in case of partnerships, corporations, and

the like, the person who actually signs should add his own name: thus, "Smith & Co., by John Smith, one of such partnership."

No. 126.]

Referee's Certificate in Composition.

FORM NO. 126.

**Referee's Certificate in Composition.<sup>23</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To the Honorable ..... District Judge :

I, ....., one of the referees in bankruptcy of your court, do hereby certify as follows :

*First:* That ....., the bankrupt herein, was duly adjudicated such on the .... day of ....., 19.., and that he filed his schedules of creditors and property herein, as provided by § 7 (8) of the bankruptcy law of 1898, on the .... day of ....., 19..

*Second:* That the first meeting of creditors was held herein on the .... day of ....., 19.., and the bankrupt was then examined in open court; and that such examination was taken by a stenographer, reduced to writing, and forms a part of the record-book handed up herewith.

*Third:* That, at such first meeting of creditors, claims of creditors, aggregating ..... dollars (\$....) in amount, and ..... (....) in number, were duly allowed, and that the names and residences of such creditors and the amounts at which their claims were allowed, are set forth in Schedule A hereto annexed and made a part of this report.

*Fourth:* That, at such first meeting of creditors, claims of creditors entitled to priority, amounting to ..... dollars (\$....) in amount, and ..... (....) in number, were duly allowed, and that the names and residences of such creditors and the

<sup>23.</sup> Since the referee cannot confirm a composition, and practically all the papers are on file with him, this certificate is necessary. See, generally, Section Twelve.

amounts at which their claims were allowed as entitled to priority, are set forth in Schedule B hereto annexed and made a part of this report.

*Fifth:* That, at the date of this certificate, the claims of certain creditors duly scheduled have not yet been presented for allowance, and that the names and residences of such creditors and the amounts of their claims as so scheduled are set out in Schedule C hereto annexed and made a part of this report.

*Sixth:* That the cost of this proceeding, as shown by said record-book, is, to this date, ..... dollars (\$....).

*Seventh:* That appraisers were appointed herein and have filed a report, showing the value of the assets of said bankrupt to be ..... dollars (\$....), and that the basis of their valuation in such report is as follows:<sup>24</sup> .....

*Eighth:* That the said bankrupt, after he had been so examined and so filed said schedules, offered terms of composition to his creditors at ..... per cent. (...%), as shown by his offer handed up herewith.

*Ninth:* That a majority in number of all of said creditors whose claims have been allowed, viz.: ..... (....) creditors, whose claims represent a majority in amount of all such allowed claims, viz.: ..... dollars (\$....), have accepted in writing said bankrupt's offer of composition; all as is shown by such acceptances, handed up herewith.

*Tenth:* That, so far as appears from the files and records herein, said composition will be for the best interests of the creditors and is made in good faith and not procured by any means, promises, or acts prohibited by said bankruptcy law, nor has the bankrupt been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge.<sup>25</sup>

I hand up herewith, for the information of the judge:

(1) The record-book of this proceeding to the date of this certificate.

(2) All claims allowed or refused allowance.

(3) The appraisal, above mentioned.

<sup>24</sup>. For instance: Sixty per cent. of cost, or cost price, or, as the facts may be.

<sup>25</sup>. This paragraph may be modi-

fied to fit the facts, and should not be inserted if the referee is in doubt on any of the matters mentioned therein. See § 12-d.



No. 126.]

Referee's Certificate in Composition.

- (4) The offer of composition.
- (5) The acceptances of creditors.
- (6) All other papers filed with me herein.

Respectfully submitted,

.....,

*Referee in Bankruptcy.*

Dated, ....., ....., ....., 19...

SCHEDULE A.

Claims Allowed.

Names of creditors.	Residences.	Amount allowed.	
		Dolls.	Cts.

SCHEDULE B.

Priority Claims Allowed.

Names of creditors.	Residences.	Amount allowed.	
		Dolls.	Cts.

SCHEDULE C.

Claims Not Yet Allowed.

Names of creditors.	Residences.	Amount scheduled.	
		Dolls.	Cts.

Order to Show Cause in Composition.

[No. 127.]

FORM NO. 127.

**Order to Show Cause in Composition.<sup>26</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt* . .

In Bankruptcy No. ....

Whereas, application has been made for the confirmation of the composition offered by the above-named bankrupt, and it appears that such composition has been accepted in writing by a majority in number of all of his creditors whose claims have been allowed, which majority represents a majority in amount of such claims, and that the consideration for such composition required by § 12-b of the bankruptcy law of 1898 has been duly deposited; now, on motion of ..... Esq., attorney for such bankrupt,

It is ordered:

That all creditors of ..... a bankrupt, as well as all other parties in interest, show cause, at a hearing to be had on such application before the District Court of the United States for the ..... District of ....., at ....., in the ..... of ....., in said district, on the .... day of ....., 19.., at .... o'clock, .. M., or as soon thereafter as such hearing is called, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order to each of the creditors, parties in interest and attorneys entitled to notice in this proceeding, and by publishing a copy hereof in the designated newspaper of the county district of such bankrupt's residence, as provided by such law.

<sup>26</sup>. The application for this order generally, Section Twelve, ante. See may be made by Form No. 61, which, also forms just ante and post. however, should be verified. Consult,

No. 128.]

Appearance in Composition.

That such notice be so given by or under the direction of the referee in charge of this proceeding.<sup>27</sup>

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . day of . . . . ., 19...

{ Seal of  
the court. }

. . . . .,

Clerk.

FORM No. 128.

**Appearance of Objecting Creditor in Composition.**<sup>28</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

*Bankrupt* .

In Bankruptcy No. ....

To the District Court of the United States for the . . . . . District of . . . . .

The clerk of this court will please enter my appearance as attorney for . . . . ., of . . . . ., . . . ., a creditor of . . . . ., the above-named bankrupt, who desires to file a specification of objection to the confirmation of his proposed composition herein.

Dated, . . . . ., . . . ., . . . ., . . . ., 19...

. . . . .,

Attorney for . . . . .,

Objecting Creditor.

Address. ....

<sup>27</sup>. Or, if that is the local practice, XXXII, for time within which this appearance must be entered, and compare Equity Rule XVII.

<sup>28</sup>. Consult, generally, Section Twelve. See also General Order

Specification of Objection in Composition.

[No. 129.]

FORM NO. 129.

**Specification of Objection in Composition.<sup>29</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Now comes ....., of ....., a creditor and person interested in the estate of ....., the above-named bankrupt, and does hereby oppose and object to the confirmation of the composition offered by said bankrupt, and, for grounds of such opposition and objection, does file the following specification:<sup>30</sup>

That<sup>31</sup> such confirmation is not and will not be for the best interests of the creditors of said bankrupt because of the following facts, which the undersigned charges to be true, viz.:<sup>32</sup>

.....  
.....  
.....

Wherefore, objection is made to such confirmation and a hearing and the judgment of the court is asked thereon.

.....,

*Objecting Creditor.*

[by

.....,

*his attorney.*

STATE OF .....,  
County of .....,  
City of .....,

} ss.:

Address, .....

I, ....., the objecting creditor mentioned and described in the foregoing specification of objection, do hereby

<sup>29</sup>. Consult for available objections Section Twelve, ante. See also General Order XXXII.

<sup>30</sup>. There may, of course, be more than one objection.

<sup>31</sup>. Or specify any other objection mentioned in § 12-d.

<sup>32</sup>. Here set out facts as in any other pleading, showing them in sufficient detail to give the bankrupt

No. 136.]      Reference to Special Master in Composition.

make solemn oath that the statements of fact contained therein are true, according to the best of my knowledge, information, and belief.<sup>33</sup>

Subscribed and sworn to before me, this .... day of ....., 19...

FORM NO. 130.

**Order of Reference to Special Master in Composition.<sup>34</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

*Bankrupt .*

In Bankruptcy No. ....

Whereas, application has been made for the confirmation of a composition offered by the above-named bankrupt, and a hearing set to consider the same, and ....., a creditor of said bankrupt, having appeared by ....., Esq., his attorney, and filed a specification of objection to such confirmation; now, on motion of ....., Esq., attorney for .....

It is ordered:

That the issue made by such application and such specification of objection be referred to ....., Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the .... day of ....., 19...

{ Seal of  
the court. }

.....,  
Clerk.

proper notice of the issue he must meet.

<sup>33</sup>. If the specification is made by the creditor's attorney, the latter's affidavit should show why the creditor does not verify and how the attorney

is acquainted with the facts; also that he is authorized by the creditor to file the specification and verify for him.

<sup>34</sup>. This form will not be used if the judge determines to hear the mat-

Report of Special Master in Composition.

[No. 131.]

## FORM NO. 131.

**Report of Special Master in Composition.<sup>35</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt*

In Bankruptcy No. ....

To the Honorable ..... District Judge:

I, ....., special master, appointed herein by an order of your court, dated the .... day of ....., 19.., do hereby report as follows:

On receipt of said order, I set<sup>36</sup> the .... day of ....., 19.., at .... o'clock, ... M., at ....., in the ..... of ....., in said district, as the time and place at which such reference should be proceeded with, and notified the respective attorneys; that, at such time and place, the bankrupt was represented by ..... Esq., his attorney, and the objecting creditor by ..... Esq., his attorney, and<sup>37</sup> that there were the following additional appearances: .....

That, thereafter, the proceedings were as indicated in the record-book of such reference, which, with the testimony taken and the depositions used, is handed up herewith.

That, in accordance with such proceedings, and after due consideration, I do find the facts to be as follows:<sup>38</sup>

.....  
.....

ter himself. See Section Twelve, generally, and the foot-notes to forms just ante and post.

<sup>35.</sup> See foot-note 34 to Form No. 130. This form can also be used for the several reports by a special master referred to in the text and post.

<sup>36.</sup> For practice on references to special masters, see Equity Rules LXXIII to LXXXIV.

<sup>37.</sup> If there were no additional appearances strike this out.

<sup>38.</sup> The referee usually prepares his own findings. They should be

No. 132.]

Order Confirming, etc., Composition.

That, on such facts, it is my opinion, and I do, therefore, recommend, that:<sup>39</sup> .....

My fees on such reference are ..... dollars (\$....), and my disbursements are ..... dollars (\$....), a total of ..... dollars (\$....), which have been paid to me by the petitioning bankrupt.<sup>40</sup>

I hand up herewith:

(1) The record-book on this reference, including the testimony of witnesses therein.

(2) The petition.

(3) The specification of objection.

(4) The depositions used on such reference.

(5) The exhibits referred to in such record-book.

(6) All other papers filed or used on such reference.

Dated, ....., ....., ....., ....., 19...

Respectfully submitted,

.....,

*Special Master.*

FORM No. 132.

**Order Confirming (or Refusing to Confirm) Composition.**<sup>41</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Whereas, an application for the confirmation of the composition at ..... per cent. (....%), offered by the bankrupt to his cred-

stated with sufficient particularity to inform the judge as to the issue, and, if possible, refer to the testimony by page number and to depositions by name of deponent and date.

39. Here state the conclusion and recommendation in a single sentence.

40. Or "the objecting creditor," as the case may be.

41. This form accomplishes the

itors, has been made herein, and it appearing that such composition has been accepted by a majority in number of all of the creditors whose claims have been allowed, and that such number represents a majority in amount of such claims, and the consideration required by § 12-b of the bankruptcy law of 1898 having been deposited in the place designated by this court; and an order having been previously granted requiring creditors to show cause why such composition should not be confirmed, and due notice having been given as required by § 58-a (2), and no specification of objections to such confirmation having been filed,<sup>42</sup> and the court being satisfied in all of the particulars specified in § 12-d of said law,<sup>43</sup>

It is ordered that<sup>44</sup> said composition be, and the same hereby is, in all things confirmed.

It is further ordered that distribution of said consideration shall be made by . . . . ., the trustee herein,<sup>45</sup> and that he, first, pay from said deposit the claims of creditors entitled to priority, as fixed by the files and records of this proceeding or as may hereafter be ordered;<sup>46</sup> second, pay the costs of this proceeding<sup>47</sup> in the sums and to the persons as likewise so fixed; third, pay, according to the terms of said composition, the claims of the general creditors<sup>48</sup> allowed herein, as shown by the files and records of this proceeding and as may hereafter be ordered; and fourth, if any balance shall remain, that the same continue on deposit until twelve months from this date, subject to such subsequent orders as may be granted herein during that period, and then, if any of said consideration shall remain, that the same be distributed by the person above designated *pro rata* among such cred-

same as Forms Nos. 62 and 63, and also formally dismisses the proceeding. Consult, generally, Section Twelve, and for effect of confirmation, see §§ 14-c, 21-f-g, and 70-f. See also General Orders XII (3), XXIX, and XXXII.

42. Or if a specification of objections was filed, strike out this clause and substitute "and a specification of objection having been filed by . . . . ., and the same having been duly heard," reciting the reference to the special master, if any, and the filing of his report and its recommendation; for such recitals, see Form No. 142.

43. If confirmation is denied, change this recital to fit the facts.

44. In that event also stop here and add: "confirmation of such composition be and the same hereby is refused; and the referee in charge is directed to proceed with the administration of said estate," concluding with the teste clause at the end of the form.

45. Or by the referee or the clerk, as the court may order.

46. See § 64-a-b.

47. See §§ 62 and 64-b (3).

48. See § 57.



No. 133.]      Petition for Extension of Time in Discharge.

itors as, prior to that time, shall have proven and had their claims allowed herein.<sup>49</sup>

It is further ordered that said proceeding in bankruptcy against the above-named bankrupt be, and the same hereby is dismissed.

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . day of . . . . ., 19..

{ Seal of  
the court. }

. . . . .,  
Clerk.

FORM NO. 133.

**Petition for Extension of Time to Apply for Discharge.<sup>50</sup>**

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. . . . .

To the Honorable . . . . ., District Judge:

Your petitioner respectfully shows:

That he is the bankrupt herein.

That more than twelve and less than eighteen months have elapsed since the . . . . day of . . . . ., 19.., when he was adjudicated bankrupt.

That he was unavoidably prevented from filing an application for a discharge within twelve months after such adjudication for the following reasons.<sup>51</sup> .....

That he desires to file such application and secure a discharge.

That no previous application has been made to this or any other court for the order hereinafter asked.

49. See § 66.

50. Consult Section Fourteen, generally.

51. Here give reasons as, for instance, lack of funds to pay expenses, illness, absence, etc. See § 14-a.

## Referee's Certificate on Application for Extension. [No. 134.]

Wherefore your petitioner prays for an order extending his time to file such petition for discharge until the expiration of eighteen months from the date of such adjudication.

Dated, ....., ....., ....., ....., 19...

.....,

*Petitioner.*

[Add verification as in Form No. 103.]

## FORM NO. 134.

**Referee's Certificate on Application for Extension of Time.**<sup>52</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To the Honorable ..... District Judge:

I, ....., referee in bankruptcy in charge of this proceeding, do hereby certify:

That the above-named bankrupt was adjudicated herein on the .... day of ....., 19...

That, from the files and records of such proceeding and any information possessed by me, there appears no reason why such bankrupt's petition for an extension of time to file application for a discharge should not be granted;<sup>53</sup> and that, in my opinion, such bankrupt has not been guilty of laches in applying for his discharge.

I, therefore, recommend that his petition for extension of time be granted.

Dated, ....., ....., ....., ....., 19...

.....,

*Referee in Bankruptcy.*

<sup>52</sup>. This certificate is not required, but is often applied for, the referee having all the facts before him.

<sup>53</sup>. Or, if reasons against the grant-

ing of the petition or any facts which should be brought to the attention of the judge exist, state them here. Consult Section Fourteen.

No. 135.] Order Extending Time to Apply for Discharge.

FORM NO. 135.

Order Extending Time to Apply for Discharge.<sup>54</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt*

In Bankruptcy No. ....

Whereas, a petition for an extension of time to apply for discharge, as provided in § 14-a of the bankruptcy law of 1898, has been filed by the above-named bankrupt, and an order to that effect is recommended by ..... Esq., the referee in bankruptcy in charge of this proceeding; now, on motion of ..... Esq., attorney for said bankrupt,

It is ordered;

That the time of ..... the bankrupt herein, to apply for a discharge be, and the same hereby is, extended until the expiration of eighteen months from the .... day of ....., 19.., the date of his adjudication herein.

Witness, the Honorable ..... Judge of the said court, and the seal thereof, at the city of ....., in said district, on the .... day of ....., 19...

{ Seal of  
the court. }

.....,  
Clerk.

<sup>54</sup>. This order usually follows the petition and certificate, Forms Nos. 133 and 134. Consult Section Fourteen, ante; and for other forms on proceedings for a discharge, see Forms Nos. 57, 58, and 59, as supplemented by Forms Nos. 136, 137, 138, 139, 140, 141, and 142. See also General Order XXXI.

Order to Show Cause on Discharge.

[No. 136.]

## FORM NO. 136.

**Order to Show Cause on Application for Discharge.<sup>55</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Whereas, application has been made by the above-named bankrupt for a discharge, as provided by § 14-a of the bankruptcy law of 1898; now, on motion of ..... Esq., attorney for such bankrupt,

It is ordered:

That all creditors of<sup>56</sup> ....., a bankrupt, as well as all other parties in interest, show cause, at a hearing to be had on such application before the District Court of the United States for the ..... District of ....., at ....., in the ..... of ....., in said district, on the .... day of ....., 19.., at .... o'clock, ... M., or as soon thereafter as such hearing may be had, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order at least ten days prior to the date set for such hearing to each of the creditors, parties in interest and attorneys<sup>57</sup> entitled to notice of proceedings herein, and by publishing a copy hereof in the designated newspaper of the county district of such bankrupt's residence, not later than one week prior to such date.<sup>58</sup>

55. This form is intended as a substitute for the "Order of Notice" which is a part of Form No. 57. For criticisms of same, see Sections Fourteen and Fifty-eight.

56. In partnership cases, substitute: "of ....., a partnership and ..... and .....,

as individuals, members of such co-partnership, bankrupts."

57. For instance those designated by creditors under General Order XXI (2).

58. See § 58-b, and compare § 58-a (2).

No. 137.] Referee's Certificate of Conformity on Discharge.

That such notice be so given by, or under the direction of, the referee in bankruptcy in charge of this proceeding.<sup>59</sup>

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . . day of . . . . ., 19...

{ Seal of  
the court. }

. . . . .,

*Clerk.*

FORM NO. 137.

Referee's Certificate of Conformity on Discharge.<sup>60</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

To the Honorable . . . . ., District Judge:

I, . . . . ., referee in bankruptcy in charge of this proceeding, do hereby certify:

That I have given the notice of the hearing on the application of the bankrupt for a discharge, as directed by an order dated the . . . . day of . . . . ., 19.., herein, as appears by the affidavit of mailing<sup>61</sup> . . . . ., and the affidavit of publication, hereto attached and made a part hereof.

That, from the files and record-book of this proceeding, it appears that . . . . . was adjudicated bankrupt herein on the . . . . day of . . . . ., 19...

That the administration of said bankrupt's estate is closed.<sup>62</sup>

59. Or by the clerk, as is the practice in each district.

60. This form conforms to the practice in those districts where the referee, and not the clerk, gives the notice of application for a discharge. It is usually drawn by the referee. Consult Section Fourteen, generally,

for practice. See also forms just ante and post.

61. Or "my certificate of mailing" if the referee mails the notices himself.

62. Or, if the case is not closed, state the facts, as: "not closed, but has proceeded to a first meeting and choice of trustee, and the bankrupt's

Appearance on Discharge.

[No. 138.]

That from such files and record-book, it satisfactorily appears that such bankrupt has not committed any of the offenses or done any of the acts which would be an objection to his discharge, and that, in my opinion, such application should be granted.<sup>63</sup>

Dated, ....., ....., ....., ....., 19...

.....,

*Referee in Bankruptcy.*

FORM No. 138.

**Appearance by Objecting Creditor on Discharge.<sup>64</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	<p>In Bankruptcy No. ....</p>
---	---	-------------------------------

To the District Court of the United States for the ..... District  
of .....

The clerk of this court will please enter my appearance as attorney for ....., of ....., ....., a creditor of ....., the above-named bankrupt, who desires to file a specification of objection to the application of such bankrupt for a discharge.

Dated, ....., ....., ....., ....., 19...

.....,

*Attorney for Objecting Creditor.*

Address, .....

.....

examination is completed;" or "to a first dividend."

63. If the contrary is true, or there is any reason why the hearing should be postponed, state the facts and make the proper recommendation.

64. Consult, generally, Section Fourteen, ante. See also General Order XXXII, for time within which this appearance must be entered, and compare Equity Rule XVII.

No. 139.]

Specification of Objection to Discharge.

FORM No. 139.

**Specification of Objection to Discharge.<sup>65</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Now comes ....., of ....., a creditor and person interested in the estate of ....., the above-named bankrupt, and opposes and objects to the granting of such bankrupt's application for a discharge, and, for grounds of such opposition and objection, does file the following specification:

I. That such application should not be granted, because of the following facts, which the undersigned charges to be true, viz.:<sup>66</sup>

II. That such application should not be granted, because of the following facts, constituting an additional ground, which the undersigned charges to be true, viz.:<sup>67</sup>

Wherefore, objection is made to the granting of such application

<sup>65</sup>. Consult, generally, Section Fourteen, ante, and General Order XXXII. This form is thought more in accord with § 14-b and such General Order than is Form No. 58. See also forms just ante and post.

<sup>66</sup>. For instance: "That such applicant was granted a discharge in a voluntary proceeding within six years prior to this application, to wit: in the District Court of the

United States for the ..... District of ....., on the .... day of ....., 19..."

<sup>67</sup>. If a second ground is alleged insert it here, for instance: "Such applicant has committed one of the offenses punishable by imprisonment specified in § 29-b of the bankruptcy law of 1898, in that" specifying the offense charged, giving time, place, and transaction.

Reference to Special Master on Discharge.

[No. 140.]

for a discharge and a hearing and the judgment of the court is asked thereon.

.....  
*Objecting Creditor,*  
 [by  
 .....  
*his Attorney,*<sup>69</sup>  
 Address, .....  
 .....  
 .....]

[Add verification as in Form No. 129.]

## FORM NO. 140.

**Order of Reference to Special Master on Discharge.<sup>70</sup>**

In the District Court of the United States for the ..... District  
 of .....

IN THE MATTER OF  .....  <i>Bankrupt .</i>	}	In Bankruptcy No. ....
--	---	------------------------

Whereas, application has been made by the above-named bankrupt for a discharge herein and a hearing set to consider the same, and ..... , a creditor of said bankrupt, having appeared by ..... , Esq., his attorney, in opposition, and filed a specification of objection thereto; now, on motion of ..... , Esq., attorney for ..... ,

It is ordered:

That the issue made by such application and such specification of objection be referred to ..... , Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable ..... , Judge of the said court,

<sup>69</sup>. See foot-note 33 to Form No. 129. and post. This form will not be used if the judge determines to hear the matter himself.

<sup>70</sup>. Consult, generally, Section Fourteen, and the forms just ante



Nos. 141, 142.] Report of Special Master; Order Denying Discharge.

and the seal thereof, at the city of . . . . ., in said district, on the . . . . day of . . . . ., 19...

{ Seal of  
the court. }

.....,

*Clerk.*

FORM NO. 141.

**Report of Special Master on Discharge.<sup>71</sup>**

See Form No. 131, and the foot-notes thereto. Such form is equally available in a proceeding for discharge.

FORM NO. 142.

**Order Denying Discharge, After Reference to Special Master.<sup>72</sup>**

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Whereas, application has been made by . . . . ., a bankrupt, for a discharge herein, and a specification of objection having been filed thereto by . . . . ., a creditor and party in interest, and such specification having been referred to . . . . ., Esq., as special master, to ascertain and report the facts with his opinion, and such special master having reported and recommended that such specification be sustained, and exceptions<sup>73</sup> to such report having been duly filed by said bankrupt, and the same having been argued; now, on motion of . . . . ., Esq., attorney for such

<sup>71</sup>. For practice, consult Section Fourteen, and the forms just ante and post.

<sup>72</sup>. This order is the converse of Form No. 59, and, in cases of hearings before a special master resulting in a report recommending a discharge and

awarding costs, etc., can, it is thought, be adapted to it. Consult, generally, Section Fourteen, ante.

<sup>73</sup>. If no exceptions were filed, leave this clause out. For practice on exceptions, see Equity Rules LXXXIII and LXXXIV.

## Voluntary Petition of Partnership.

[No. 143.]

objecting creditor, . . . . ., Esq., attorney for the bankrupt, appearing in opposition,

It is ordered:

That the specification of objection of . . . . ., a creditor and party in interest herein, be, and the same hereby is, sustained.

That the application of the said . . . . ., a bankrupt, be, and the same hereby is, denied.

That<sup>74</sup> the objecting creditor herein recover and have judgment against the bankrupt for<sup>75</sup> . . . . . dollars (\$. . . . .), being . . . . . dollars (\$. . . . .), less costs, and . . . . . dollars (\$. . . . .), his disbursements herein.

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . day of . . . . ., 19. . .

{ Seal of  
the court. }

. . . . .,  
Clerk.

## FORM NO. 143.

**Voluntary Petition of Partnership, All Partners Not Joining.<sup>76</sup>**

To the Honorable . . . . ., Judge of the District Court of the United States, for the . . . . . District of . . . . .:

The petition of . . . . ., and . . . . ., of the . . . . . of . . . . ., in the county of . . . . ., in said district, by occupation respectively . . . . . and . . . . ., respectfully shows:

That your petitioners and . . . . . are and have been partners under the style of . . . . ., which partnership has had its principal place of business at the . . . . . of . . . . ., in the county of . . . . ., in said district,<sup>77</sup> for the greater portion of the six months immediately preceding the filing of this petition; and that said partnership is insolvent and owes debts in excess of one thousand dollars (\$1,000).

That your petitioners as individuals each owes debts which he is unable to pay in full.

<sup>74</sup>. If costs are allowed, add this.

<sup>75</sup>. The disbursements should be shown by affidavit at time application for costs is made.

<sup>76</sup>. This form can be adapted to a case where all the partners join, and then used as a substitute for Form

No. 2, if desired. Consult, generally, Sections Five and Eighteen, and see General Orders VI, VII, and VIII.

<sup>77</sup>. If the petition is filed in the district of the domicile or residence of one of the partners, here add an allegation to show the fact.

No. 143.]

Voluntary Petition of Partnership.

That such partnership and your petitioners are willing to surrender its and their property for the benefit of its and their creditors, respectively, except such as is exempt by law, and desire to obtain the benefits of the bankruptcy law of 1898, as amended.

That the said . . . . ., whose place of residence is in the . . . . . of . . . . ., in the . . . . . district of . . . . ., has refused and still refuses to join in this petition; that he is neither a wage-earner nor a person engaged chiefly in farming or the tillage of the soil, and as an individual, owes debts which he is unable to pay in full.

That<sup>78</sup> such partnership has been dissolved, but there has as yet been no final settlement thereof.

That the schedule hereto annexed marked A, and verified by your petitioners' oaths, contains a full and true statement of all the debts of said partnership, and (so far as it is possible to ascertain) the names and residences of its creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked B, and verified by your petitioners' oaths, contains an accurate inventory of all of the property of said partnership, both real and personal, and such further statements<sup>79</sup> concerning said property as are required by said law.

That the schedule hereto annexed marked C, and verified by the oath of your petitioner . . . . ., contains a full and true statement of all of his individual debts, and (so far as it is possible to ascertain) the names and places of residence of his individual creditors, and such further statements concerning said debts as are required by said law.

That the schedule hereto annexed marked D, and verified by the oath of your petitioner . . . . ., contains an accurate inventory of all of his individual property, both real and personal, and such further statements concerning said property as is required by said law.<sup>80</sup>

Wherefore, your petitioners pray that such partnership and your petitioners as individuals may be adjudged bankrupt within

78. If there has been a dissolution, use this clause, modifying slightly the previous allegations to fit; if not, leave it out. See § 5-a.

79. If exemption is claimed in the partnership assets, insert a reference

to such claim here. See Section Six, ante.

80. Repeat the last two paragraphs as to each partner, numbering the schedules, Schedule E and F, G and H, etc.

## Involuntary Petition by Three Creditors.

[No. 144.]

the purview of such bankruptcy law of 1898, as amended, and that service of this petition with a subpoena be made upon . . . . ., such nonconsenting partner, and that such proceedings be had as are provided in said law and General Order VIII of the Supreme Court and as the court may order.

. . . . .,

. . . . .,

*Petitioners.*

. . . . .,

*Attorney for Petitioners.*

STATE OF . . . . ., }  
 County of . . . . ., } ss.:  
 City of . . . . ., }

We, . . . . . and . . . . ., the petitioning debtors mentioned and described in the foregoing petition, do severally make solemn oath that the statements of fact contained therein are true, according to the best of our knowledge, information, and belief.

. . . . .

. . . . .

Subscribed and sworn to before me, this . . . day of . . . . ., 19...

. . . . .,

. . . . .

[Attach schedules and summary statements for each the partnership and the petitioning partners, using those suggested by Form No. 1, but changing their lettering to correspond to the allegations of the petition.]

FORM NO. 144.

**Involuntary Petition by Three Creditors.<sup>81</sup>**

To the Honorable . . . . ., Judge of the District Court of the United States, for the . . . . . District of . . . . .:

The petition of . . . . ., of . . . . ., . . . . ., and . . . . ., of . . . . ., . . . . ., and . . . . ., of . . . . ., . . . . ., respectfully shows:<sup>82</sup>

<sup>81</sup> This form should be executed in duplicate. It is intended as a substitute for Form No. 3, which is clearly demurrable. See Sections Three, Four, Five, Eighteen, and Fifty-nine, and the forms for involuntary proceedings, immediately post.

<sup>82</sup> If petitioners are corporations, indicate under what laws; if copartnerships, set out the firm name and

No. 144.]

Involuntary Petition by Three Creditors.

That ..... of the ..... of ....., in said district, has, for the greater portion of the six months next preceding the date of the filing of this petition, had his principal place of business<sup>83</sup> at the ..... of ....., in the county of ....., in said district, and is by occupation a .....

That the said ..... owes debts to the amount of one thousand dollars (\$1,000) and over, is insolvent, and is neither a wage-earner nor a person engaged principally in farming or the tillage of the soil.<sup>84</sup>

(That<sup>85</sup> the said ..... is a corporation, organized under the laws of the State of ....., and that it is engaged principally in trading and mercantile pursuits.)

(That,<sup>86</sup> upon information and belief, the said ..... has less than twelve creditors.)

That your petitioners are creditors of said ....., having provable claims against him which amount in the aggregate, in excess of the value of securities held by them, to five hundred dollars (\$500); and that neither of your petitioners is entitled to priority of payment on his said claim, within the meaning of § 64-b of the bankruptcy law of 1898, nor has either of your petitioners received a preference within the meaning of § 60-a-b of such law, as amended.<sup>87</sup>

That the nature and amount of your petitioners' claims and the securities held by them, if any, are as follows:<sup>88</sup> .....

That, within four months preceding the filing of this petition, viz.: on the .... day of ....., 19.,<sup>89</sup> the said ....., while insolvent, committed an act of bankruptcy in that he did<sup>90</sup> .....

add: "composed of ..... and .....," etc.

83. Or "resided" or "had his domicile," as the case may be.

84. If the bankruptcy of a partnership is asked, modify this paragraph and those preceding so as to show the jurisdictional allegations as to the partnership and the individuals composing it, suggested by Form No. 143.

85. If the alleged bankrupt is a corporation, insert this paragraph, modifying the previous allegations where necessary.

86. Use only if petition is by one creditor.

87. Or as the case may be. See § 59-b.

88. Set out sufficient facts to inform the court as to amount, consideration, and the like.

89. If the act of bankruptcy was evidenced by an instrument that was required to be recorded or might be recorded, see § 3-b (1), and modify this allegation to fit the facts.

90. Here set out the act of bankruptcy clearly, giving sufficient facts

## Involuntary Petition by Three Creditors.

[No. 144.]

(That<sup>91</sup> your petitioners have made diligent effort to find the said ..... within said district; that he is not, and has not for .... days been at his place of business; nor has he during the same time been at his usual place of abode; that, according to your petitioners' best information and belief, the said ..... has absconded; and that personal service of a subpoena cannot be made on him in said district.)

Wherefore,<sup>92</sup> your petitioners pray that service of this petition, with a subpoena, may be made upon ....., as provided by said bankruptcy law of 1898 as amended, and that he may be adjudged bankrupt within the purview of such law.

.....,

.....,

.....,

.....,

*Petitioners.**Attorney for Petitioners.*

STATE OF .....,  
 County of ....., } ss.:  
 City of ....., }

..... and ..... and .....,<sup>93</sup> the petitioning creditors mentioned and described in the foregoing petition, do hereby severally make solemn oath that the statements of fact contained in the foregoing petition are true, according to the best of their knowledge, information, and belief.<sup>94</sup>

.....,

.....,

.....

Subscribed and sworn to before me, this .... day of ....., 19...

.....,

.....

as to time, place, transaction, etc., to show unequivocally the commission of an act or acts bringing the case within one of the subdivisions of § 3-a.

91. Use only when order of publication is to be asked. Change facts in form to fit the facts of each case.

92. If the bankruptcy of a partnership is desired, modify this clause so

that it will ask adjudication of both the partnership and the individuals. See Form No. 143.

93. If verified by members of a partnership or officers of a corporation, describe the affiants properly.

94. If, for any reason, this verification is made by attorney, change to fit the facts, and bring it within the cases cited on p. 218, ante.

No. 145.]

Order Directing Service by Publication.

FORM NO. 145.

**Order Directing Service by Publication.<sup>95</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Whereas, a petition was, on the .... day of ....., 19.., filed herein for an adjudication of bankruptcy against ....., and it appears therefrom that said bankrupt is not within the district and that personal service of the subpoena herein cannot be made on him therein; now, on motion of ....., Esq., attorney for said petitioner,

It is ordered:

That service of such subpoena be made by publishing this order, together with said subpoena, in ....., a newspaper published at ....., ...., in said district, once a week for two consecutive weeks, the last of such publications to be on the .... day of ....., 19..; and by mailing a copy of this order and said petition and subpoena to the last known place of abode of the said ....., in said district, on or before the day of the first publication.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the .... day of ....., 19...

{ Seal of  
the court. }

.....,

*Clerk.*

<sup>95</sup>. This form is thought to be in accordance with the new method of service by publication, provided by the amendatory act of 1903. See Section Eighteen. The subpoena should be made returnable at least "ten days after the last publication."

General Appearance in Involuntary Case.

[No. 146.]

FORM NO. 146.

**General Appearance in Involuntary Case.<sup>96</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To the District Court of the United States, for the ..... District  
of .....

The clerk of this court will please enter my appearance as attorney for ....., of ....., ....., the alleged bankrupt<sup>97</sup> who desires to plead herein in response to the petition of ..... and ..... and ....., that the said ..... be adjudicated bankrupt.

Dated, ....., ....., ....., ....., 19...

.....,

*Attorney for* .....

Address, .....

.....

<sup>96</sup>. This appearance must now be filed within five days after the return day. See § 18-b, as amended. Consult Section Eighteen, ante, and see General Order IV and Equity Rule VII.

<sup>97</sup>. Or "a creditor of the alleged bankrupt," if a creditor, and not the bankrupt, appears.



No. 147.]

Appearance by Intervening Creditor.

FORM No. 147.

Appearance by Intervening Creditor.<sup>98</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To the District Court of the United States for the ..... District  
of .....:

I, ....., a creditor of ....., against whom a petition for an adjudication in bankruptcy, filed by ....., on the .... day of ....., 19.., is pending, desire to appear in such proceeding; and, to that end, the clerk of this court will please enter my presence, by ....., Esq., of No. .... St., ....., whom I hereby appoint as my attorney for such proceeding, and take note that I join in such petition as provided in § 59-f of the bankruptcy law of 1898.

Dated, ....., 19..

.....,

*Intervening Creditor.*

Address .....,

.....

STATE OF .....,  
County of ....., } ss.:  
City of ....., }

On this .... day of ....., 19.., before me appeared .....  
....., the intervening creditor above mentioned, and acknowledged the execution of the above.

.....,

.....

<sup>98</sup>. Consult, generally, Sections involuntary cases immediately ante and Eighteen and Fifty-nine, especially the post.  
latter. See also numerous forms for

---

Application for Jury Trial in Involuntary Case. [No. 148.]

---

FORM NO. 148.

**Application for Jury Trial in Involuntary Case.<sup>1</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

I, ....., of the ..... of ....., in said district, the alleged bankrupt, who have this day filed an answer to the petition herein for an adjudication in bankruptcy, do hereby apply for and demand a trial by jury in respect to those questions concerning which I am entitled thereto by the terms of § 19-a of the bankruptcy law of 1898.

Dated, ....., ....., 19...

.....,

*Answering Bankrupt.<sup>2</sup>*

1. Consult, generally, Sections Eighteen and Nineteen. See also Form No. 6. This application can be made only by the alleged bankrupt. For the time within which it must be filed, see § 19-a.

2. This application should be made by the alleged bankrupt, and not by his attorney.

No. 149.]

General Answer in Involuntary Case.

FORM NO. 149.

**General Answer in Involuntary Case.<sup>3</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt* .

In Bankruptcy No. ....

Now comes ....., of ....., the person against whom a petition for an adjudication in bankruptcy has been filed herein,<sup>4</sup> and does hereby controvert such petition and file the following answer:<sup>5</sup>

I. That<sup>6</sup> the said ..... did not commit an act of bankruptcy as alleged in such petition, but, on the contrary, the undersigned charges the facts to be: that<sup>7</sup> .....

II. That<sup>6</sup> ..... and ..... and ....., the petitioning creditors herein, have not provable claims against the said ..... which amount in the aggregate, in excess of the value of securities held by them, to five hundred dollars (\$500), but, on the contrary, the undersigned charges the facts to be: that<sup>8</sup> .....

3. This form supplements Form No. 6. Consult, generally, Section Eighteen; and for available grounds for an answer see §§ 3-a-b, 4, 5, and 59. For form for adjudication, see Form No. 12; for dismissal, see Form No. 11. See also, generally, the Equity Rules.

4. Or "a creditor of ....., against whom," showing clearly the possession of a provable debt (§ 63, as interpreted by § 57).

5. There may, of course, be several counts in the answer. Careful pleading seems to require one for at least each material fact at issue.

6. The two objections here suggested are but samples. Each answer should be adapted to the facts relied on.

7. Here the facts relied on by the answering bankrupt or creditor should be pleaded.

8. Id.

Answer Alleging More Than Twelve Creditors.

[No. 150.]

Wherefore, answer is made to such petition and a hearing<sup>9</sup> and the judgment of the court is asked thereon.

.....

*Answering Bankrupt.*<sup>10</sup>

[by

.....,

*his Attorney.*<sup>11</sup>

Address .....,

.....]

[Add verification as in Form No. 129, changing to fit the facts, as, for instance, substituting "answer" for "specification of objection," therein.]

FORM NO. 150.

**Answer Alleging More Than Twelve Creditors.**<sup>12</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Now comes ....., of ....., ....., the person against whom a petition for an adjudication in bankruptcy has been filed herein,<sup>13</sup> and does hereby controvert such petition and file the following answer:

That the creditors of the said ..... are twelve and more in number.

That annexed hereto is a list of all such creditors, with their

<sup>9</sup>. Or "trial."<sup>10</sup>. Or "creditor."<sup>11</sup>. See foot-note 33 to Form No. 129.<sup>12</sup>. Only available where the petition is within § 59-d. Consult, gen-

erally, Sections Fifty-nine and Eighteen. See foot-notes just ante and post.

<sup>13</sup>. See foot-note 4 to Form No. 149.

No. 150.] Answer Alleging More Than Twelve Creditors.

addresses, under oath, as required by § 59-d of the bankruptcy law of 1898.

Wherefore, answer is made to such petition, and a hearing<sup>14</sup> and the judgment of the court is asked thereon.

.....,

*Answering Bankrupt.*<sup>15</sup>

[by

.....,

*his Attorney,*

Address ..... ,

.....]

# List of Creditors and Addresses.

The following is the list of the creditors and their addresses, referred to in the foregoing answer :

Names of creditors.	Addresses.

.....,

*Answering Bankrupt.*<sup>15</sup>

STATE OF ..... ,  
 County of ..... ,  
 City of ..... ,

} ss.:

I, ..... , the answering bankrupt<sup>16</sup> mentioned and described in the foregoing answer, do hereby make solemn oath that the statements of fact contained in such answer are true, according to the best of my knowledge, information, and belief; and also that the list annexed thereto and therein referred to comprises all of

<sup>14</sup>. A jury trial cannot be demanded on the issue raised by this answer.

<sup>15</sup>. Or "creditor."

<sup>16</sup>. See foot-note 33 to Form No. 129.

Order of Reference in Involuntary Case.

[No. 151.]

the creditors of the said ..... and gives their addresses, so far as they are known or can be ascertained.<sup>17</sup>

Subscribed and sworn to before me, this .... day of ....., 19...

.....,

.....

## FORM No. 151.

**Order of Reference to Special Master in Involuntary Case.<sup>18</sup>**

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Whereas, a petition has been filed herein asking an adjudication in bankruptcy of the above-named bankrupt, and ....., the said bankrupt,<sup>19</sup> having appeared by ....., Esq., his attorney, and filed an answer to such petition; now, on motion of ....., Esq., attorney for .....,

It is ordered:

That the issue made by such petition and answer be referred to ....., Esq., as special master, to ascertain and report the facts, with his conclusions thereon.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the .... day of ....., 19...

{ Seal of }  
{ the court. }

.....,

*Clerk.*

17. If the affidavit is made by an answering creditor, his efforts to ascertain the names and addresses of the creditors should be given.

18. See foot-note 34 to Form No.

130. Consult, generally, Section Eighteen, and the forms just ante and post.

19. Or "a creditor of such bankrupt."

Nos. 152, 153.] Report of Special Master; Exceptions to Report.

FORM NO. 152.

**Report of Special Master in Involuntary Case.<sup>20</sup>**

See Form No. 131, and the foot-notes thereto. With slight changes in the recitals, such form is equally available on a reference in an involuntary case.

FORM NO. 153.

**Exceptions to Report of Special Master in Involuntary Case.<sup>21</sup>**

In the District Court of the United States for the ..... District  
of .....

<p style="text-align: center;">IN THE MATTER OF</p> <p>.....</p> <p style="text-align: center;"><i>Bankrupt .</i></p>	}	In Bankruptcy No. ....
---	---	------------------------

Now comes ....., of ....., ...,<sup>22</sup> who previously filed herein an answer to the petition for an adjudication in bankruptcy of the above-named bankrupt,<sup>23</sup> and excepts to the report of ....., Esq., as special master, appointed by an order made herein on the .... day of ....., 19.., in that such report<sup>24</sup> .....  
for the following reasons:<sup>25</sup> .....

<sup>20.</sup> For practice, consult Section Eighteen, and the forms just ante and post.

<sup>21.</sup> For practice, see Equity Rules LXXXIII and LXXXIV. Consult, generally, Section Eighteen. For form for adjudication, see Form No. 12; for dismissal, see Form No. 11; for costs, see General Order XXXIV and § 2 (18).

<sup>22.</sup> If exceptions are filed by at-

torney, as is usual, add "by .....  
....., his attorney herein."

<sup>23.</sup> Or if the exceptions are taken by the petitioning creditor, change to fit the facts.

<sup>24.</sup> Here state the error or errors excepted to.

<sup>25.</sup> Here give the grounds of the exceptions, that the court and the opposing attorney may know fully the issue to be determined on the hearing on the exceptions.

Petition for Dismissal of Involuntary Case.

[No. 154.]

And prays that the same may be heard, as provided in Equity Rule LXXXIII.

Dated, ....., ....., 19...

.....,

*Excepting Creditor.*

[or

.....,

*Attorney for Excepting* .....

Address .....,

.....]

FORM No. 154.

**Petition of Petitioning Creditors for Dismissal in Involuntary Case.<sup>26</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

To the Honorable ....., District Judge:

Your petitioners<sup>27</sup> respectfully show:

That, on the .... day of ....., 19.., they filed a petition herein for an adjudication in bankruptcy against ....., of the ..... of ....., in said district.

That, since that time, the following proceedings have been had:<sup>28</sup>

.....

That your petitioners desire and consent that said petition and proceeding be dismissed.

That annexed hereto is a list of all the creditors of the said ..... with their addresses, so far as your petitioners know or have been able to ascertain.

<sup>26.</sup> Consult, generally, Sections Fifty-nine, Fifty-eight, and Eighteen. for want of prosecution, and, if so, the allegations should be changed to fit the facts.

<sup>27.</sup> This petition can, of course, be made by the bankrupt, with the consent of the petitioning creditors, or

<sup>28.</sup> Here give a brief summary of the steps in the proceeding to date.



No. 154.]      Petition for Dismissal of Involuntary Case.

That no previous application has been made for the order hereinafter asked.

Wherefore, your petitioners pray that such proceeding and petition be dismissed, and that notice be given such creditors as is provided by § 58-a (8) of the bankruptcy law of 1898.

.....,  
.....,  
.....,

*Petitioners.*

**List of Creditors and Addresses.**

The following is the list of the creditors and their addresses referred to in the foregoing petition:

Names of creditors.	Addresses.

.....,  
.....,  
.....,

*Petitioners.*<sup>29</sup>

STATE OF ....., }  
County of ....., } ss.:  
City of ....., }

We, ....., and ....., the petitioners mentioned and described in the foregoing petition, do hereby severally make solemn oath that the statements of fact contained in such petition are true, according to the best of our knowledge, information, and belief; and also that the list annexed thereto and therein referred to comprises all of the creditors of the

<sup>29</sup>. This petition cannot be made by the attorney, save when the petition for an adjudication can be so made. See, generally, Section Eighteen, and Form No. 144.

---

Order to Show Cause on Petition for Dismissal. [No. 155.]

---

said ..... and gives their addresses, so far as they are known or can be ascertained.

.....,

.....,

.....

Subscribed and sworn to before me, this .... day of ....., 19...

.....,

.....

FORM NO. 155.

**Order to Show Cause on Petition for Dismissal in Involuntary Case.<sup>30</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

Whereas, application has been made by the petitioning creditors herein<sup>31</sup> for the dismissal of their petition for an adjudication in bankruptcy against ....., of the ..... of ....., in said district; now, on motion of ....., Esq., attorney for such alleged bankrupt,

It is ordered:

That all creditors of<sup>32</sup> ..... show cause, before the District Court of the United States for the ..... district of ....., at ....., in the ..... of ....., in said district, on the .... day of ....., 19.., at .. M., or as soon thereafter as such hearing may be had, why such application should not be granted.

That notice of such hearing be given by mailing a copy of this order at least ten days prior to the date set for such hearing to

<sup>30</sup>. Compare Form No. 154 and the foot-notes thereto.

<sup>32</sup>. See foot-note 56 to Form No. 136.

<sup>31</sup>. See foot-note 27 to Form No. 154.

No. 156.] Order of Dismissal in Involuntary Case.

each of the creditors whose names appear in the list of creditors annexed to the petition on which this application is based, and by publishing a copy hereof in the designated newspaper of such alleged bankrupt's residence, not later than one week prior to such date.<sup>33</sup>

Witness, the Honorable . . . . ., Judge of the said court, and the seal thereof, at the city of . . . . ., in said district, on the . . . day of . . . . ., 19...

{ Seal of  
the court. }

. . . . .,

Clerk.

FORM No. 156.

Order of Dismissal on Petition of Petitioning Creditors and After Notice in Involuntary Case.<sup>34</sup>

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

*Bankrupt* .

In Bankruptcy No. ....

Whereas, a petition was, on the . . . day of . . . . ., 19.., filed herein for an adjudication in bankruptcy against . . . . ., and application was subsequently made for a dismissal of such proceeding and petition by the petitioners therein,<sup>35</sup> and an order to show cause having been granted thereon, and notice having been given as provided in said order, such matter having been regularly called and no creditor having appeared to oppose,<sup>36</sup> and the court being satisfied that said petition should be granted,<sup>37</sup> now, on motion of . . . . ., Esq., attorney for . . . . .,

33. § 58-b.

34. See Forms Nos. 154 and 155 and the foot-notes thereto.

35. Or, if by the bankrupt, or for want of prosecution, state the facts.

36. Or, if a creditor appeared, note appearance and the facts.

37. Or, if the application is to be refused, "denied."

## Referee's Certificate of Disqualification.

[No. 157.]

It is ordered:

That the petition herein to have ..... adjudicated bankrupt and the proceedings thereon be, and the same hereby are, dismissed.<sup>38</sup>

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the .... day of ....., 19...

{ Seal of  
the court. }

.....,

*Clerk.*

FORM No. 157.

Referee's Certificate of Disqualification.<sup>39</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

To the Honorable ....., District Judge:

I, ....., one of the referees in bankruptcy of your court, do hereby certify that I am disqualified to act as such in the above-entitled proceeding,<sup>40</sup> for the following reasons:<sup>41</sup> .....

I do, therefore, return the papers transmitted to me by the clerk.

Dated, ....., ....., 19...

.....,

*Referee in Bankruptcy.*

38. Or, if the application for dismissal is refused, change to conform to the order made.

39. For general disqualification, see § 35; for what referees may not do, § 39-b; for reference of case after adjudication, see § 22.

40. Or the disqualification may exist as to a portion of the proceeding, as in a contest on a certain claim.

41. Here insert reasons, as relationship, relation of attorney and client with bankrupt, or any other reason (see § 22).

No. 158.]

Petition to Revise in Matter of Law.

FORM NO. 158.

Petition to Revise in Matter of Law.<sup>42</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To<sup>43</sup> the Honorable, the Judges of the Circuit Court of Appeals of  
the ..... Circuit of the United States:

Your petitioner respectfully shows:

That he resides at ....., ..., and is a creditor<sup>44</sup> of .....  
....., a bankrupt, who was so adjudged by the District  
Court of the United States for the ..... District of ....., on  
the .... day of ....., 19...

That, after such adjudication, the following proceedings were  
had in the case of the said bankrupt:<sup>45</sup> .....

That, on the .... day of ....., 19..., an order was granted and  
entered by said District Court of the United States,<sup>46</sup> .....

.....,  
a copy of which order is hereto annexed.

That said order was erroneous in matter of law in that:<sup>47</sup> .....

<sup>42.</sup> Consult, generally, Sections  
Twenty-four and Twenty-five, and  
General Order XXXVI, though the  
latter seems to refer to appeals only.

<sup>43.</sup> If the petition is to the District  
Court in the first instance, this form  
should be addressed to the District  
Judge.

<sup>44.</sup> Or specify how he is interested  
in the proposed revision.

<sup>45.</sup> Here recite steps leading up to  
the ruling or order complained of.

<sup>46.</sup> Here state specifically the erro-  
neous order or ruling of which re-  
vision in law is sought, as, "enjoining  
and restraining your petitioner from  
disposing of the following described  
property, viz.: .....;" or, "re-  
quiring your petitioner to deliver to  
the said trustee in bankruptcy certain  
property, viz.: .....;" or as the  
facts may be.

<sup>47.</sup> Here give the equivalent of an  
assignment of error on an appeal in  
equity.

Order Allowing Revision.

[No. 159.]

Wherefore, your petitioner, feeling aggrieved because of such order, asks that the same may be revised in matter of law by your honorable court, as provided in § 24-b of the bankruptcy law of 1898, and the rules and practice in such case provided.<sup>48</sup>

.....

*Petitioner.*

[Add verification as in Form No. 103.]

FORM NO. 159.

**Order of District Court Allowing Petition for Revision in Matter of Law.<sup>49</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Whereas, application has been made for revision in matter of law by the Circuit Court of Appeals of the .... Circuit of the United States of the order entered herein on the .... day of ....., 19.., and the court being satisfied that the question there determined is one of which revision may be asked, as provided in § 24-b of the bankruptcy law of 1898,<sup>50</sup> and that the application should be granted; on motion of ....., Esq., attorney for the petitioner,

It is ordered:

That the order of this court, made and entered herein on the .... day of ....., 19.., be revised in matter of law by the Cir-

<sup>48</sup>. See Section Twenty-five, ante, foot-note 11.

<sup>49</sup>. Use this form only in case application is made to the District Court in the first instance. If application is made to the Circuit Court of Appeals, a formal order allowing the review is often not entered, but the case is at

once docketed and the clerk gives notice of the pendency of the petition for revision to the respondent. See Section Twenty-five, foot-note 11.

<sup>50</sup>. Certain orders cannot be reviewed at all, others only by appeal. Consult, generally, Section Twenty-five, ante.

No. 160.]

Notice to Respondent on Revision.

cuit Court of Appeals of the ..... Circuit of the United States, as provided by § 24-b of the bankruptcy law of 1898, and the rules and practice of that court.

That the clerk, within ..... days from this date, prepare, at the expense of the petitioner, a certified copy of such order and of the record of this case pertinent to such order, and file the same with the clerk of such Circuit Court of Appeals.

Witness, the Honorable ....., Judge of the said court, and the seal thereof, at the city of ....., in said district, on the .... day of ....., 19...

{ Seal of  
the court. }

.....,

Clerk.

FORM No. 160.

**Notice to Respondent on Revision.<sup>51</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

To ....., of ....., and ....., of .....,  
..., his attorney:

Please take notice<sup>52</sup> that a petition, a copy of which is served on you herewith, is pending in the Circuit Court of Appeals of the ..... Circuit of the United States, and that you are required to answer, demur, plead, or move to dismiss the same within<sup>53</sup> .....

<sup>51</sup>. See Sections Twenty-four and Twenty-five, ante, and the forms just ante.

<sup>52</sup>. In the First Circuit, this notice takes the form of an order to show cause entered as of course. This form can be easily modified to fit that prac-

tice. It is thought to combine both the features of a mere notice and the more formal elements of an order to show cause. Compare Section Twenty-five, foot-note 11.

<sup>53</sup>. This time is usually fixed by rule.

Order of Circuit Court of Appeals on Revision.

[No. 161.]

days from the date of this notice, or, in case of your default, the same may be granted and a mandate issued accordingly.

Witness, the Honorable, the judges of the Circuit Court of Appeals of the ..... Circuit, and the seal of said court, at ....., in said Circuit, this .... day of ....., 19...

{ Seal of  
the court. }

.....,

Clerk.

## FORM No. 161.

Order of Circuit Court of Appeals on Revision.<sup>54</sup>

At a session of the Circuit Court of Appeals for the ..... Circuit, held at the city of ....., in the ..... District of ....., on the .... day of ....., 19...

Present—The Hon. ...., Circuit Judge;  
The Hon. ...., Circuit Judge, and  
The Hon. ...., Judge.

IN THE MATTER OF

.....

*Bankrupt*

In Bankruptcy No. ....

A petition having been filed herein by ....., of ....., ....., on the .... day of ....., 19.., asking for revision in matter of law of the order of the District Court of the United States for the ..... District of ....., in bankruptcy, made and entered in the above-entitled case, and due notice of such petition having been given the respondent, and the same having been regularly heard,<sup>55</sup> ....., Esq., appearing for the petitioner, and ....., Esq., for the respondent, and this court being satisfied that:<sup>56</sup> .....

<sup>54</sup>. See, generally, Sections Twenty-four and Twenty-five.

<sup>55</sup>. Here specify how, as "and submitted on briefs without oral argument;" or as the facts may be.

<sup>56</sup>. Here recite briefly the decision as to whether or not error in law was committed by the court below.



No. 162.]

Petition for Review of Referee's Order.

It is ordered:

That the said petition of ..... for a revision be, and the same hereby is, dismissed,<sup>57</sup> with costs.

That the mandate of this court issue to said District Court accordingly.

Witness, the Honorable, the Judges of the circuit court of appeals of the ..... Circuit, and the seal of said court, at ....., in said Circuit, this .... day of ....., 19...

{ Seal of  
the court. }

.....,

*Clerk.*

FORM No. 162.

**Petition for Review of Referee's Order.<sup>58</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

To ..... Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is a creditor<sup>59</sup> of ..... the above-named bankrupt, and that his claim has been allowed herein.

That, on the .... day of ....., 19..., an order, a copy of which is hereto annexed, was made and entered herein.

That such order was and is erroneous in that<sup>60</sup> .....

.....  
.....

57. Or "granted;" or, if in part only, "granted in so far as it refers to ....."

58. See, generally, Section Thirty-nine, ante. Consult also General Order XXVII. Note §§ 2 (10) and 38-a. Compare also Form No. 112, and the foot-notes thereto.

59. Or "the trustee" or otherwise, as the facts may be. See General Order XXVII.

60. Here give the equivalent of an assignment of error in an appeal in equity, or a concise statement of the error relied on.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated, ....., 19...

.....,  
Petitioner.

[Add verification as in Form No. 103.]

### FORM NO. 163.

#### Referee's Certificate on Review.<sup>61</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To the Hon. ...., District Judge:

I, ....., the referee in bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order,<sup>62</sup> a copy of which is annexed to the petition hereinafter referred to, was made and entered on the .... day of ....., 19...

That, on the .... day of ....., 19.., ....., a ..... in such proceeding, feeling aggrieved thereat, filed a petition for a review, which was granted.

That a summary of the evidence on which such order was based is as follows:<sup>63</sup> .....

<sup>61</sup>. This form is of more general application than Form No. 56, which savors more of the practice under the law of 1867. Consult, generally, Section Thirty-nine. See also General Order XXVII. See Form No. 162 for petition.

<sup>62</sup>. If a question is to be certified without decision, use Form No. 56.

<sup>63</sup>. Here recite the facts leading up to the order, perhaps calling attention to the pages of the record-book and the documents handed up. See General Order XXVII.

No. 164.] Order Approving Appointment of Trustee.

That the question presented on this review is:<sup>64</sup> .....

I hand up herewith, for the information of the judge, the following papers:

- (1) The record-book of this proceeding;
- (2) The petition on which this certificate is granted;
- (3) All other papers filed with me herein which are pertinent to this review.

Dated, ....., ....., 19...

Respectfully submitted,

.....,

*Referee in Bankruptcy.*

FORM NO. 164.

Order Approving Appointment of Trustee.<sup>65</sup>

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

This being the day appointed for the first meeting of creditors herein, and due notice thereof having been given as provided by the bankruptcy law of 1898, and ..... having been appointed trustee herein by a majority vote in number and amount of claims of all the creditors of said bankrupt previously allowed and present at such meeting, and they having fixed the amount of his

<sup>64</sup>. Here phrase the question involved into an interrogation, if possible limiting it to a single sentence. See General Order XXVII.

<sup>65</sup>. This is a substitute for Forms Nos. 22 and 23. Consult, generally, Section Forty-four, as affected by § 2 (17) and General Order XIII. See also §§ 45, 46, 50, 55, and 56.

Trustee's First Report.

[No. 165.]

bond at \$. . . . . ; now, on motion of . . . . . , Esq., attorney for . . . . . ,

It is ordered:

That the appointment of . . . . . be, and the same is hereby, approved,<sup>66</sup> and that he be and become trustee herein, on filing a bond, with sufficient sureties, in \$. . . . . , as provided in § 50-b of the bankruptcy law of 1898, to be approved by this court.

. . . . . ,

*Referee in Bankruptcy.*

FORM NO. 165.

**Trustee's First Report.<sup>67</sup>**

In the District Court of the United States for the . . . . . District of . . . . .

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. . . . .

To . . . . . , Esq., Referee in Bankruptcy:

I, . . . . . , the trustee in this proceeding, do hereby report as follows:

That, on the . . . day of . . . . . , 19. . , I was appointed trustee herein, immediately qualified by filing the required bond, and have since acted as such.

That, upon entering on such duties, I prepared a complete inventory of all the property of such bankrupt,<sup>68</sup> which showed such property to consist as follows:<sup>69</sup> . . . . .

66. In case approval is denied, change the recitals and the order, and where a new meeting is necessary, insert the clause calling such meeting and directing the giving of notice.

67. Consult, generally, Section Forty-seven. See, for penalty if report not filed, General Order XVII. This report must be filed within one

month after the trustee is appointed. See § 47-a (10). The form here is merely a suggestion. Reports of this kind differ greatly in each case.

68. If an appraisal has been taken, it should also be referred to here, and a summary of it given.

69. State briefly the kind, location, value of, and incumbrances, if any, on

No. 165.]

Trustee's First Report.

That<sup>70</sup> I have caused a certified copy of the order approving such bond and of the adjudication herein to be filed for record in the offices where conveyances are recorded in the county of . . . . ., in said district.<sup>71</sup>

That the following is a brief detailed statement of the steps in such proceeding to this date, not hereinbefore mentioned:<sup>72</sup> . . . . .

.....

That I desire instruction as to the following matters:<sup>73</sup> . . . . .

.....

That I have on hand in cash . . . . . dollars (\$ . . . .), which is deposited in the . . . . . Bank, the designated depository of this court,<sup>74</sup> and that said sum is sufficient<sup>75</sup> for a first dividend of . . . per cent. (. . . %), for the declaration and payment of which I do hereby apply.

Dated, . . . . ., . . . . ., . . . . ., 19...

Respectfully submitted,

.....,

*Trustee.*

STATE OF . . . . ., }  
County of . . . . ., } ss.:  
City of . . . . ., }

I, . . . . ., the trustee herein, do hereby make solemn oath that the statements of fact contained in the above report are true, according to the best of my knowledge, information, and belief.

.....

Subscribed and sworn to before me, this . . . day of . . ., 19...

.....,

.....

the property, or refer to the inventory or the appraisers' report on file.

<sup>70.</sup> Use this paragraph only where there is real estate.

<sup>71.</sup> See §§ 21-e and 47-e.

<sup>72.</sup> Here set out briefly the more important steps of the proceeding to the date of this report.

<sup>73.</sup> Ask such instruction or order as the facts warrant, as to interven-

ing in suits, whether suits to set aside alleged preferences or fraudulent transfers shall be brought, whether there shall be an immediate sale of the property or a part of it, etc., as the facts of each proceeding suggest.

<sup>74.</sup> Stop here, if there is not enough on hand for a first dividend.

<sup>75.</sup> See § 65-b, as amended by act of 1903.

Order Declaring, etc., First Dividend.

[No. 166.]

FORM NO. 166.

**Order Declaring and Ordering First Dividend Paid.<sup>76</sup>**

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Application having been heretofore made for the declaration of a first dividend of not less than ..... per cent. (...%) herein, on the report of ....., the trustee herein, and due notice having been given of the proposed declaration and payment of such dividend, and no objections having been made thereto, and it appearing from said trustee's report that such dividend will not include more than fifty per cent. (...%) of the money of the estate in excess of the debts which have priority not yet paid and such claims as will probably be allowed; now, on motion of ....., Esq., attorney for such trustee,

It is ordered:

That a dividend of ..... per cent. (...%) be, and the same hereby is, declared on all claims, not entitled to priority, allowed herein to this date, in accordance with a dividend sheet hereto annexed.

That the said dividend be paid by the trustee herein forthwith.<sup>77</sup>

.....

*Referee in Bankruptcy.*

<sup>76.</sup> Consult, generally, Sections Forty-seven and Sixty-five. See also General Order XXIX, and §§ 39-a(1), 58-a(5).

<sup>77.</sup> If debts entitled to priority have not been paid, add a paragraph directing their payment and specifying the names of the priority claimants and the amounts at which their claims have been allowed.

No. 167.]

Trustee's Final Report and Account.

Dividend Sheet.

No.	Dr.	Sum allowed.		Cr.	

.....,

*Referee in Bankruptcy.*

FORM No. 167.

Trustee's Final Report and Account.<sup>78</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

To ..... Esq., Referee in Bankruptcy:

I, ....., the trustee in this proceeding, do hereby make my final report and account as follows:

That, on the .... day of ....., 19.., I was appointed trustee herein, immediately qualified by filing the required bond, and have since acted as such.

That I have previously filed reports herein under dates of the .... day of ....., 19.., and the .... day of ....., 19...

<sup>78</sup>. This form is merely a suggestion. It is impossible to give more than a skeleton of a report which must vary widely with each case. Consult, generally, Section Forty-seven, also General Order XVII. This report must be on file fifteen days before a meeting can be held. Compare also Form No. 165, and see Form No. 168. For the account, see Form No. 49. If there are no assets, Form No. 58 should be used.

## Trustee's Final Report and Account.

[No. 167.]

That the following is a brief detailed statement of the steps in this proceeding since the date of my last report:<sup>79</sup> .....

That the said bankrupt's property is now reduced to money,<sup>80</sup> except<sup>81</sup> ....., which property, for the following reasons<sup>82</sup> .....

should be sold at public auction at the time of the final meeting herein.

That more than three months<sup>83</sup> has elapsed since the first dividend to creditors was declared, and said estate is now ready to be closed.

That annexed hereto is my final account, duly verified.<sup>84</sup>

Dated, ....., 19...

Respectfully submitted,

.....,

*Trustee.*

**Final Account.<sup>85</sup>**

[See and use Form No. 49.]

STATE OF .....,  
County of ....., } ss.:  
City of ....., }

I, ....., the trustee herein, do hereby make solemn oath that the statements of fact contained in the foregoing report are true, according to the best of my knowledge, information, and belief; also that the account thereto annexed is true, and contains entries of every sum of money received by me as such trustee, and

<sup>79</sup>. Here set out briefly the more important steps of the proceeding since the last report, among other things, showing the cash on hand at that time and the total of receipts and disbursements since.

<sup>80</sup>. If all in the form of cash, stop here.

<sup>81</sup>. If any property remains unsold, specify it here.

<sup>82</sup>. Give reasons for a sale, specifying whether there are any offers

and the probable value, if any, of such assets.

<sup>83</sup>. See § 65-b, as amended by the act of 1903.

<sup>84</sup>. See § 47-a(8) and Form No. 49.

<sup>85</sup>. Arrange with breaks and balances corresponding to the different dividend periods, so as to permit the making of the summary statement at the end of Form No. 168.



No. 168.]

Final Order of Distribution.

that the payments in such account stated to have been made by me have been so made.<sup>86</sup>

Subscribed and sworn to before me, this .... day of ....., 19...  
 .....  
 .....

FORM NO. 168.

**Final Order of Distribution.**<sup>87</sup>

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

In Bankruptcy No. ....

*Bankrupt .*

A final report and account having been filed by ....., the trustee herein, and due notice having been given of said filing and of a final meeting of creditors to examine and pass on such account<sup>88</sup> and of the declaration and time of payment of a final dividend herein,<sup>89</sup> and no objection having been made to such account or to the declaration and payment of such dividend;<sup>90</sup> now, on motion of ....., Esq., attorney for the trustee herein,

It is ordered:

That the final account of ....., the trustee herein, be, and the same hereby is, approved.

<sup>86</sup>. This oath is an adaptation of Form No. 50.

<sup>87</sup>. Consult, generally, Section Forty-seven, and see §§ 55-f, 58-a (5) (6), 62, 64 and 65, and General Order XXIX.

<sup>88</sup>. If for a sale of remaining assets, recite the fact here, and also any

other matter included in the notice for the meeting.

<sup>89</sup>. If the notice included one for a proposed sale of assets recite that fact here.

<sup>90</sup>. In case of sale, add: "or to such proposed sale."

## Final Order of Distribution.

[No. 168.]

That<sup>91</sup> .....:

That the trustee disburse from the money on hand, for expenses of administration, the following:<sup>92</sup> .....

..... which sums are hereby allowed, and retain in his hands ..... dollars (\$....) for his necessary expenses in making distribution hereunder.

That said trustee pay to the following creditors<sup>93</sup> entitled to priority of payment the sums severally set opposite their names, viz.:<sup>94</sup>

That the attorney's fee herein be ..... dollars (\$....), which sum is hereby allowed; and that it be paid by said trustee to ..... Esq., attorney for the bankrupt, ..... dollars (\$....), and<sup>95</sup> to ..... Esq., attorney for the petitioning creditors, ..... dollars (\$....).

That<sup>96</sup> said trustee pay to ..... Esq., his attorney herein, ..... dollars (\$....), which sum is hereby allowed to him for the services of such attorney, as a part of the expenses of administration herein.

That<sup>97</sup> said trustee pay the previous dividend of ..... per cent. (...%) to the following creditors, entitled thereto: .....

That, from the balance remaining on hand, said trustee retain his commissions, which are hereby fixed at the maximum amount specified in § 48 of the bankruptcy law of 1898, as amended, viz.: ..... dollars (\$....), and pay to the undersigned referee his

91. If a sale was also had, insert a clause approving such sale here.

92. Here add the items, something as follows: "To ..... for ....., \$ ....." The items are usually the expenses of giving notice of the meeting, stenographer's fees, or the filing fees and expenses of petitioning creditors in involuntary cases. See § 62, and compare § 64-b (3).

93. See § 64-b (4) (5).

94. Here set out the names of priority creditors whose claims have been allowed and not previously paid, with the amounts to which they have

been found entitled in a schedule in the body of the form, similar to that in Form No. 19.

95. Use only in involuntary cases.

96. Use only where the trustee has found it necessary to employ and has employed an attorney.

97. Use only when claims have been proven since the first dividend, setting out (1) name, (2) amount of claim proven, and (3) amount of dividend in a schedule in the body of the form, similar to the Dividend Sheet at the end of this form.

No. 168.]

Final Order of Distribution.

commissions and claim fees as fixed by § 40 of said law, as amended, viz.: ..... dollars (\$....).

That the balance then remaining, viz.: the sum of ..... dollars (\$....), be disbursed in a final dividend of ..... per cent, (....%), which is hereby declared and ordered paid forthwith, to the creditors whose claims are approved herein and on the amount as appears on the dividend sheet hereto annexed.

That, on the coming in of vouchers for the payments herein ordered, the trustee and the sureties on his bond be, and they are hereby, discharged.

That the annexed summary statement be sent or delivered to each creditor when said dividend is paid to him.<sup>98</sup>

.....,

*Referee in Bankruptcy.*

#### Dividend Sheet.

[See Form No. 166, and copy in same matter.]

#### Summary Statement.

Total cash collected by trustee.....	\$.....
--------------------------------------	---------

Disbursed prior to or at time of first dividend:

For .....	\$.....
-----------	---------

For priority claims .....	.....
---------------------------	-------

For first dividend of .....%	.....
------------------------------	-------

Total . . . . .	\$.....
-----------------	---------

Balance on hand after first dividend.....	\$.....
---	---------

Cash collected since, as per final account.....	.....
---	-------

Total cash for distribution on final report.....	\$.....
--	---------

Disbursed as follows:

For .....	\$.....
-----------	---------

For expenses of administration.....	.....
-------------------------------------	-------

For priority claims.....	.....
--------------------------	-------

For attorney's fee, under § 64-b (3).....	.....
---	-------

98. This is not required, but is suggested as a safe and courteous practice.

## Trustee's Dividend Check and Receipt.

[No. 169]

For legal services to trustee.....	.....
For first dividend of ....% to creditors whose claims had not then been allowed.....	.....
For trustee's commissions.....	.....
For referee's commissions and fees.....	.....
For final dividend.....	.....
	<hr/> \$..... <hr/>

FORM No. 169.

**Trustee's Combined Dividend Check and Receipt.<sup>99</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

\$.....

No. ....

....., ....., ....., ....., 19...

The ..... National Bank of .....

Pay to the order of ....., ..... dollars, being a .....  
dividend of ..... per cent. (....%) on ..... claim allowed in  
the proceeding of ....., a bankrupt, by order dated .....,  
....., 19...

.....,

Countersigned,

*Trustee.*

.....,

*Referee in Bankruptcy.*

<sup>99</sup>. This form is of course merely generally, Section Forty-seven. See  
a suggestion to trustees who wish to also § 65 and General Order XXIX.  
do their work thoroughly. Compare,

No. 170.]

Referee's Certificate of Fees Payable.

RECEIPT.

(Do not detach. If detached, the check will not be honored.)

\$.....

No. ....

....., ....., ....., ....., 19...

Received of ..... the trustee of ..... a bankrupt, being in full of the ..... dividend of ..... per cent. (....%) on ..... claim allowed in the proceeding of such bankrupt, by order dated ..... .., 19...

.....  
(Creditor's Signature.)

FORM NO. 170.

Referee's Certificate of Fees Payable.<sup>1</sup>

In the District Court of the United States for the ..... District of .....

IN THE MATTER OF FEES IN PROCEEDINGS IN BANKRUPTCY REFERRED TO

.....

*Referee in Bankruptcy.*

To ..... Clerk of the United States District Court, for the ..... District of .....

I, ....., the referee in bankruptcy to whom the proceedings in bankruptcy hereinafter mentioned were referred, do hereby certify that the following cases are closed and the fees now payable as follows:

To trustees:

No. case.	Name of bankrupt.	Name of trustee.

1. Consult, generally, Section Fifty- amended by the act of 1903; also one. See also §§ 40 and 48, as General Orders XXIX and XXXV.

## Bond of Trustee, with Justification.

[No. 171.]

To bankrupts (no trustee having been appointed):

No. case.	Name of bankrupt.

To the referee:

No. case.	Name of bankrupt.

Dated, ....., ....., 19...

.....,

*Referee in Bankruptcy.*

FORM NO. 171.

**Bond of Trustee, with Justification of Sureties.<sup>2</sup>**In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF  .....  <i>Bankrupt .</i>	}	In Bankruptcy No. ....
--	---	------------------------

Know all men by these presents: That we, ....., of the  
 ..... of ....., in said district, as principal, and .....,  
 and ....., both of the ..... of ....., in said district,  
 as sureties, are held and firmly bound unto the United States of  
 America in the sum of<sup>3</sup> ..... dollars (\$....), in lawful money

<sup>2</sup>. Consult, generally, Section Fifty. See also Form No. 25, for which this is a substitute, the former containing no justification; note § 50-d-f. This bond can be adapted to that required of a receiver.

<sup>3</sup>. See § 50-c.

No. 171.]

Bond of Trustee, with Justification.

of the United States, to be paid to the United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this .... day of ....., 19...

The condition of this obligation is such that:

Whereas the above-named ..... was, on the .... day of ....., 19.., duly adjudicated a bankrupt herein, and on the .... day of ....., 19.., the above-named ..... was appointed trustee in said proceeding in bankruptcy, and he, the said ....., has accepted said trust, with all the duties and obligations pertaining thereunto;

Now, therefore, if the said ....., trustee as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as such trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

..... [L. S.]

..... [L. S.]

..... [L. S.]

Signed, sealed, and delivered, in the presence of

.....

STATE OF .....,  
County of ....., } ss.:  
City of ....., }

On this .... day of ....., 19.., the above-named .....  
....., and ....., and ....., appeared before me,  
and severally acknowledged the execution of the foregoing bond.<sup>4</sup>

.....

.....

STATE OF .....,  
County of ....., } ss.:  
City of ....., }

..... and ....., respectively, the sureties in  
the foregoing bond, being each severally duly sworn, deposes and

4. This is not essential, but is thought good practice.

## Order Approving Trustee's Bond.

[No. 172.]

says that he is a resident of and a ..... holder within the ..... of ....., in said district, and is worth in property, at its actual value, ..... dollars<sup>5</sup> (\$....) over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Subscribed and sworn to before me, this .... day of ....., 19...

FORM NO. 172.

Order Approving Trustee's Bond.<sup>6</sup>

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ....., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

The petition for the adjudication of the above-named bankrupt, ..... having been filed herein on the .... day of ....., 19.., and ..... having been appointed trustee herein on the .... day of ....., 19.., and he having given a bond for the faithful performance of his official duties in the amount of ..... dollars (\$....), as provided by the order appointing him; now, on motion of ....., Esq., attorney for .....,

It is ordered:

That said bond be, and the same is hereby, approved.

.....,  
*Referee in Bankruptcy.*

<sup>5</sup>. See § 50-f.

<sup>6</sup>. For reasons for this, consult, generally, Sections Twenty-one and

Fifty. See also § 47-c, added by the amendatory act of 1903, and § 70-a.



No. 173.] Certificate of Referee as to Pauper Affidavit.

FORM NO. 173.

**Certificate of Referee as to Falsity of Pauper Affidavit.<sup>7</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

I, ....., referee in bankruptcy in charge of the above-entitled proceeding, do hereby certify:

That I have reason to believe that the pauper affidavit filed herein by the above-named bankrupt, as provided in § 51 (2) of the bankruptcy law of 1898, is false; and I do, therefore, set the .... day of ....., 19.., at .. M., as the time, and ....., in the ..... of ....., in said district, as the place, when said bankrupt shall be examined as to the truth of such affidavit.

Dated, ....., ....., 19...

.....,

*Referee in Bankruptcy.*

To ....., bankrupt:

You are hereby ordered to appear before the undersigned, for examination, at the time and place specified in the above certificate.

Dated, ....., ....., 19...

.....,

*Referee in Bankruptcy.*

<sup>7</sup>. Consult, generally, Section Fifty-one, and compare General Order XXXV(4).

## FORM NO. 174.

**Special Clauses for Proofs of Debt.<sup>8</sup>**

[To conform to General Order XXI.]

1. Insert at the end of all proofs of debt, not resting on a note or judgment, the following averment:

“That no note has been received for such debt<sup>9</sup> (except ..... ) nor has any judgment been rendered thereon<sup>10</sup> (except ..... ).”

2. Insert, after the statement of the “consideration” in all proofs of debt resting on open account, the following averment:

“That the said debt became due (or will become due) on the .... day of ....., 19..”

3. Insert also, in the same place, in all proofs of debt resting on open account, where the items of account mature at different dates, the following averment:

“That the average due date of said debt is the .... day of ....., 19..”

4. Insert in all proofs of debt by a corporation (Form No. 33) which are not sworn to by the treasurer, after the words “authorized to make this proof,” the following averment:

“That the same is not made by the treasurer of such corporation, for the reason that<sup>10½</sup> ..... , and that the affiant is an officer of such corporation and his duties most nearly correspond to those of treasurer.”

5. In all proofs of debt where the claim was assigned after the petition in bankruptcy, but before proof, add at the end of the proof, the following averment:

“That, at the time these proceedings in bankruptcy were begun, such debt was owned by ..... , of ..... , ..... ; that since then, by an instrument in writing, hereto

8. See, generally, Section Fifty-seven, ante, and General Order XXI. See also Forms Nos. 31, 32, 33, 34, 35, 36, 37, 38, and 39; also Forms Nos. 175 and 176.

9. If so, prove on the note, or surrender it and prove on the debt, adding an explanation here.

10. If a judgment has been entered, prove on the judgment, attaching a transcript, and specifying how much of the costs, if any, were earned before the petition in bankruptcy was filed; see § 63-a (2) (3).

10½. Here give the reason why the proof is not made by the treasurer, as absence, illness, etc.

No. 175.]      Petition for Reconsideration, etc., of Claim.

annexed, such debt has been assigned to the affiant; and that annexed hereto is a deposition by said ..... , as provided by General Order XXI (2)."

FORM NO. 175.

**Petition for Reconsideration and Rejection of Claim.<sup>11</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

..... } In Bankruptcy No. ....  
*Bankrupt .*

To ..... , Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.<sup>12</sup>

That the proof of debt of ..... , of ..... , ..... , claiming to be a creditor of the said ..... , was filed herein on the .... day of ..... , 19.., and, on the .... day of ..... , 19.., duly allowed.

That the same should not have been allowed for the following reasons:<sup>13</sup> .....

That the attorney of said claimant is ..... , Esq., of .....

11. Consult, generally, Section Fifty-seven and General Order XXI (6); and see Forms Nos. 176, 38, and 39.

12. A creditor may make this petition; if so, he should show the allowance of his claim.

13. As, for instance, because technically imperfect, or not in accordance

with the general orders, or secured, or the claimant preferred and his preference not surrendered, or want of consideration, or many other reasons. The reasons should be set forth as in a pleading, so that the claimant may have proper notice of the issue he must meet.

Notice of Reconsideration, etc., of Claim.

[No. 176.]

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore, your petitioner prays that the said proof of debt may be reconsidered and rejected.<sup>14</sup>

.....,  
Petitioner.

[Add verification as in Form No. 103.]

## FORM NO. 176.

**Notice of Petition for Reconsideration and Rejection of Claim.<sup>15</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To ..... , a creditor, and ..... , Esq., his attorney :

You will please take notice that ..... , the trustee herein,<sup>16</sup> has filed a petition asking that your claim against ..... , the above-named bankrupt, be reconsidered and rejected,<sup>17</sup> and that a hearing will be had on such petition at ..... , in the ..... of ..... , in said district, on the .... day of ..... , 19.., at .... o'clock, ... M.

Dated, ..... , ..... , ..... , 19...

..... ,

*Referee in Bankruptcy.*

14. This form can be adapted to a case where the application is to reduce but not reject *in toto*.

15. Consult, generally, Section Fifty-seven. See, for practice, General Order XXI(6). If claim is rejected, the proper order is suggested

by Form No. 39; if merely reduced, by Form No. 38.

16. If made by a creditor, change to fit the fact.

17. Or "reduced to \$....." It may be suggested that a copy of the petition should be mailed with this notice.

No. 177.]

Notice of Final Meeting.

FORM NO. 177.

**Notice of Final Meeting.<sup>18</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To the creditors of ....., of ....., in the county of  
....., and district aforesaid, a bankrupt:

Notice is hereby given that on the .... day of ....., A. D.  
19.., at ..... o'clock, .. M., there will be a meeting of the  
creditors of the above-named bankrupt at ....., in the .....  
of ....., in said district, to<sup>19</sup> *examine and pass upon the final  
report and account of ..... the trustee herein, which was  
filed in the office of the undersigned at ....., in said district, on  
the .... day of ....., 19.., and shows \$...... on hand for dis-  
tribution,*<sup>20</sup> and to transact such other business as may properly  
come before such meeting.

Dated, ....., ....., ....., 19...

.....,

*Referee in Bankruptcy.*

.....,

*Attorney for the Trustee.*

18. Consult, generally, Section Fifty-eight. See also §§ 47-a(8), 55-f, and 65. Compare Forms Nos. 18 and 179. See also for notices given by the clerk, Forms Nos. 53, 57, 127, 136, and 155.

19. The italics are used only for

convenience of reference in substituting clauses for other notices. See Form No. 178.

20. When the meeting is also for the declaration and payment of a final dividend, see Form No. 179.

## FORM No. 178.

**Special Clauses for Notices to Creditors.<sup>21</sup>**

1. Where the notice is for a hearing on an application for a discharge or composition (§ 58-a (2)), or the proposed dismissal of the proceedings (§ 58-a (7)), as previously suggested in Forms Nos. 127, 136, and 155, the order to show cause should be used.

2. Where the notice is for the examination of the bankrupt (§ 58-a (1)), at a meeting called for that purpose, substitute for the words in italics in Form No. 177, the words:

“To attend an examination of the bankrupt.”

3. Where the notice is for a proposed sale of property (§ 58-a (4)), substitute in the same place in Form No. 177, the words:

“To consider a proposed sale of the following described property, viz.:<sup>22</sup> .....

....., and if objection to said sale is not made, or, if objected to, it is ordered, forthwith to attend the sale of such property at auction to the highest bidder, on the following terms:<sup>23</sup> .....

....., subject to confirmation by the undersigned, at a continuance of such meeting, which, on the conclusion of such sale, will be taken to ....., in the .... of ....., in said district, on the .... day of ....., 19.., at .... o'clock, .. M.”

4. Where the notice is for the declaration and payment of a dividend (§ 58-a (5)), substitute in the same place in Form No. 177, the words:

“For the purpose of declaring and directing the payment of a dividend of not less than .... per cent. upon all debts allowed prior to or on that date.”

5. Where the notice is of the proposed compromise of a controversy (§ 58-a (6)), substitute in the same place in Form No. 177, the words:

“To pass upon a proposition to compromise a controversy between the trustee herein and ....., concerning<sup>24</sup> ..... by<sup>25</sup> .....”

<sup>21</sup>. Consult, generally, Section Fifty-eight. See also Form No. 177 and the foot-notes thereto.

<sup>22</sup>. Here insert description and give appraised value and the incumbrances, if any.

<sup>23</sup>. Here insert terms as to down payment, etc.

<sup>24</sup>. Here indicate the question at issue.

<sup>25</sup>. Here indicate the proposed compromise.

No. 179.]

Combined Notice to Creditors.

6. Where the notice is of a meeting of creditors for any purpose not specifically indicated in § 58-a, substitute in the same place in Form No. 177, the words:

“For the purpose of<sup>26</sup> .....”

FORM NO. 179.

Combined Notice to Creditors.<sup>27</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt* .

In Bankruptcy No. ....

To the creditors of ....., of ....., in the county of ....., and district aforesaid, a bankrupt:

Notice is hereby given that on the .... day of ....., A. D. 19.., at .... o'clock, .. M., there will be a meeting of the creditors of the said bankrupt, at ....., in the .... of ....., in said district, for the following purposes:

I. To consider a proposed sale of the following described property, viz.:<sup>28</sup> ....., and, if objection to said sale is not made, or, if objected to, it is ordered, forthwith to attend a sale of such property at auction to the highest bidder, on such terms as may then be fixed;

II. To examine and pass upon the final report and account of the trustee, which was filed in the office of the undersigned at ....., in said district, on the .... day of ....., 19.., and shows \$..... on hand for distribution;

III. For the purpose of declaring and ordering paid a final dividend herein;

<sup>26</sup>. Here describe briefly the purpose of the meeting.

<sup>27</sup>. See, generally, Section Fifty-eight, and the forms just ante, with their foot-notes.

<sup>28</sup>. Here insert description and give appraised value and the incumbrances, if any.

Affidavit of Publication of Notice.

[No. 180.]

IV. To transact such other business as may properly come before said meeting.

Notice<sup>29</sup> is also given that, unless proofs of debt are filed on or before the day set for such meeting, the same cannot share in such dividend.

Dated, ....., ....., ..... 19...

....., Esq.,

*Attorney for Trustee.*

.....,

*Referee in Bankruptcy.*

FORM NO. 180.

**Affidavit of Publication of Notice.<sup>30</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

STATE OF ....., }  
County of ....., } ss.:  
City of ....., }

[Attach slip here.]

....., of the ..... of ....., in said district, being duly sworn, deposes and says, that he is the proprietor<sup>31</sup> of ....., the newspaper designated for the publication of notices in bankruptcy in the county of ....., in said district; and that the notice to creditors in the above-entitled proceeding, of which the attached printed slip is a copy, was published in said newspaper on the .... day of ....., 19...

Subscribed and sworn to before me, this .... day of ....., 19...

.....,

.....

<sup>29</sup>. This clause should also be added to the notice of the first dividend.

<sup>30</sup>. See Section Fifty-eight, ante, and note Form No. 180.

<sup>31</sup>. Or "foreman," or "clerk," as the case may be.



No. 181.]

Affidavit of Mailing of Notice.

FORM No. 181.

**Affidavit of Mailing Notice.<sup>32</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

STATE OF .....,

County of .....,

City of .....,

} ss.:

[Attach notice here.]

....., of the ..... of ....., in said district, being duly sworn, deposes and says that, on the .... day of ....., 19... deponent mailed notices to creditors, of which the annexed printed notice is a copy, one each to the persons, copartnerships, and corporations mentioned in the schedule of names and addresses hereto annexed, by depositing such notices in sealed, postpaid envelopes,<sup>33</sup> in the general post-office, at the ..... of ....., in the district aforesaid.

.....

Subscribed and sworn to before me, this .... day of ....., 19...

.....,

.....

<sup>32.</sup> See Section Fifty-eight, ante, and Form No. 181. The original notice, the affidavit of publication, and this affidavit should be bundled together before being filed.

<sup>33.</sup> Or, if the notice is mailed by the referee, add words indicating that an "official business" envelope was used.

Order Appointing Attorney for Trustee.

[No. 182.]

FORM NO. 182.

**Order Appointing Attorney for Trustee.<sup>34</sup>**

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Application having been made for the appointment of an attorney for the trustee herein, and it appearing that the services of an attorney are and will be required, and that the appointment hereinafter made is acceptable to such trustee,<sup>35</sup> now, on motion of ..... Esq.,

It is ordered:

That ..... Esq., of the ..... of ....., in said district, be, and he hereby is, appointed attorney for the trustee herein,<sup>36</sup> his compensation to be fixed and paid as an expense of administration at the final meeting of creditors.

.....,

*Referee in Bankruptcy.*

<sup>34</sup>. See, generally, Section Sixty-two.

<sup>35</sup>. If the choice has been submitted to creditors, here recite their action.

<sup>36</sup>. Or, "that ....., the trustee, be authorized to employ ..... of the ..... of ..... in said district, as his attorney herein."

No. 183.]

Petition as to Burdensome Property.

FORM NO. 183.

**Petition for Instruction as to Burdensome Property.<sup>37</sup>**

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.

That a portion of such bankrupt's estate consists of the following  
property:<sup>38</sup> .....

That your petitioner has investigated the value of such property  
and finds the same to be worthless,<sup>39</sup> for the following reasons:<sup>40</sup>  
.....

That it will be for the benefit of said estate that your petitioner  
be instructed to disclaim title to such property and to refuse to  
take the same into his possession.

That no previous application has been made to this or any other  
court for the order hereinafter asked.

Wherefore, your petitioner prays for an order permitting him  
to disclaim title to such property and to refuse to take the same  
into his possession.

.....,

*Trustee.*

[Add verification as in Form No. 103.]

<sup>37</sup>. See Section Seventy, and compare the forms immediately ante. See also Forms Nos. 42, 43, 44, 45, and 46.

<sup>38</sup>. Here describe the property.

<sup>39</sup>. Or, if actually burdensome to the bankrupt's estate, state that fact.

<sup>40</sup>. Here give the reasons on which the order is asked, showing condition, incumbrances, etc.

Order as to Burdensome Property.

[No. 184.]

## FORM No. 184.

**Order on Petition as to Burdensome Property.**

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ..... , Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt*

In Bankruptcy No. ....

Application having been made for an order permitting the trustee herein to disclaim title to certain worthless<sup>42</sup> property, and to refuse to take the same into his possession, and it appearing that such order should be granted; now, on motion of ..... , Esq., attorney for ..... ,

It is ordered:

That ..... , the trustee herein, be, and he hereby is, directed to disclaim title to the following described property, and to refuse to take the same into his possession, viz.:<sup>43</sup> .....

..... ,

*Referee in Bankruptcy.*

41. See Form No. 183, and its foot-notes.

42. Here describe the property.

43. Or "burdensome."

No. 185.] Petition for Sale under General Order XVIII (2).

FORM No. 185.

Petition for Sale under General Order XVIII (2).<sup>44</sup>

In the District Court of the United States for the ..... District  
of .....

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

To ....., Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That he is the trustee herein.

That a portion of such bankrupt's estate consists of the following  
property;<sup>45</sup> .....

That it will be to the advantage of the estate that such property  
be sold forthwith, for the following reasons:<sup>46</sup> .....

That no previous application has been made to this or any other  
court for the order hereinafter asked.

Wherefore, your petitioner prays for an order permitting him to  
sell said property in the way and on the terms above specified.

.....,

*Trustee.*

[*Verification same as in Form No. 103.*]

44. See Section Seventy and General Order XVIII (2). Though such sales are of doubtful validity, they are common. This form can be adapted to a sale of personal property, or one at public auction under the same general order. See also Forms 42, 43, 44, 45, 46, 183, 184, 186, and 187.

45. Here insert description of property, giving its location, appraised value, the incumbrances, if any, etc.

46. Here give the reasons, as, for instance, a cash offer of 75% of the appraised value, giving name of person making the offer, etc., or the necessity of vacating the premises in which the property is, or any of the numerous reasons which require prompt action on sales of a bankrupt's assets.

Order for Sale under General Order XVIII (2). [No. 186.]

FORM NO. 186.

**Order for Sale under General Order XVIII (2).<sup>47</sup>**

At a Court of Bankruptcy, held in and for the ..... District of ....., at ....., this .... day of ....., 19...

Present: ..... Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Application having been made by the trustee herein for an order permitting such trustee to sell the following property<sup>48</sup> ..... on the terms hereinafter mentioned, and it appearing that good cause for such sale has been shown; now, on motion of ..... Esq., attorney for the trustee,

It is ordered:

That ..... the trustee herein, be, and he hereby is, authorized to sell the property above specified to ..... on receipt from him of ..... dollars (\$....) in cash.<sup>49</sup>

.....,

*Referee in Bankruptcy.*

<sup>47</sup>. See foot-note 44 to Form No. 185, and the references therein.

<sup>48</sup>. Here copy the description of the property from the petition.

<sup>49</sup>. Or, as the terms may be, usually adding a clause directing the

transfer of title by an instrument transferring only the trustee's right, title, and interest, and in no way amounting to a warranty. See Form No. 187.

No. 187.]

Order Confirming Sale, after Notice.

FORM NO. 187.

**Order Confirming Sale, after Notice to Creditors.<sup>50</sup>**

At a Court of Bankruptcy, held in and for the ..... Dis-  
trict of ....., at ....., this .... day of .....,  
19...

Present: ....., Esq., Referee.

IN THE MATTER OF

.....

*Bankrupt .*

In Bankruptcy No. ....

Application having been made by the trustee herein for the sale  
of the following property,<sup>51</sup> .....  
and a notice of proposed sale having been given thereon, as pro-  
vided by § 58-a (4) of the bankruptcy law of 1898, and no objection  
having been made to said sale, and the same having then taken  
place and said property having been sold to ..... of the  
.... of ....., in said district, for ..... dollars (\$....), and  
now coming on for confirmation, as provided in such notice; now,  
on motion of ....., Esq., attorney for the trustee herein,  
It is ordered:

That such sale be, and the same hereby is, confirmed.

That the trustee herein, on receipt of the consideration in cash,  
complete the same by executing the proper instrument trans-  
ferring to such purchaser all his right, title, and interest in said  
property, and delivering the same to such purchaser.

.....,

*Referee in Bankruptcy.*

50. See Sections Seventy and Fifty-eight. This form can be adapted to any sale, whether public or private, on notice, and should always be entered, for the protection of the purchaser's title. See special clauses for

sale on notice in Form No. 178. See also Forms Nos. 185 and 186, and compare Forms Nos. 42, 43, 44, 45, and 46.

51. See foot-note 45 to Form No. 185.





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# RULES OF PRACTICE.

## FOR THE

### COURTS OF EQUITY OF THE UNITED STATES.\*

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#### PRELIMINARY REGULATIONS.

**Rule I.** — The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

**Rule II.** — The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course, and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

**Rule III.** — Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or, on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the

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\* "In proceedings in equity instituted for the purpose of carrying into effect the provisions of the [Bankruptcy] Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be."

See General Order in Bankruptcy, No. XXXVII., November, 1898.

application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

**Rule IV.** — All motions, rules, orders, and other proceedings made and directed at chambers, or on rule days, at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open, at all office hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings, not requiring personal service on the parties, in their discretion.

**Rule V.** — All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office, which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded, by any judge of the court, upon special cause shown.

**Rule VI.** — All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the



adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted as if not objected to, or refused, in his discretion.

### PROCESS.

**Rule VII.** — The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

**Rule VIII.** — Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree shall in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.\*

**Rule IX.**—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

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\* See Rule XCII.

**Rule X.** — Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

#### SERVICE OF PROCESS.

**Rule XI.** — No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

**Rule XII.** — Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants.

**Rule XIII.** — The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person, who is a member or resident in the family.

**Rule XIV.** — Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, *toties quoties*, against such defendant, if he shall require it, until due service is made.

**Rule XV.** — The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not other-

wise. In the latter case, the person serving the process shall make affidavit thereof.

**Rule XVI.** — Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

#### APPEARANCE.

**Rule XVII.** — The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

#### BILLS TAKEN PRO CONFESSO.

**Rule XVIII.** — It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

**Rule XIX.** — When the bill is taken *pro confesso*, the court may proceed to a decree at any time after the expiration of thirty days

from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

#### FRAME OF BILLS.

**Rule XX.** — Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants by and against whom the bill is brought. The form, in substance, shall be as follows: “To the judges of the Circuit Court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says, that,” etc.

**Rule XXI.** — The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the plaintiff is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff himself supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit is required, it shall also be specially asked for.

**Rule XXII.** — If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

**Rule XXIII.** — The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

**Rule XXIV.** — Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

**Rule XXV.** — In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

#### SCANDAL AND IMPERTINENCE IN BILLS.

**Rule XXVI.** — Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recital of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred

to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

**Rule XXVII.** — No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

#### AMENDMENT OF BILLS.

**Rule XXVIII.** — The plaintiff shall be at liberty as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable reference to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

**Rule XXIX.** — After an answer, or plea, or demurrer is put in,

and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order, from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

**Rule XXX.** — If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

#### DEMURRERS AND PLEAS.

**Rule XXXI.** — No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

**Rule XXXII.** — The defendant may, and any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

**Rule XXXIII.** — The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

**Rule XXXIV.** — If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

**Rule XXXV.** — If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

**Rule XXXVI.** — No demurrer or plea shall be held bad and be overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

**Rule XXXVII.** — No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea.

**Rule XXXVIII.** — If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

#### ANSWERS.

**Rule XXXIX.** — The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases, by answer, to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters



of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defence. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

**Rule XL.** — A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Ordered (December term, 1850), that the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

**Rule XLI.** — The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say — “The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.,” and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

If the complainant, in his bill, shall waive an answer under oath,

or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.\*

**Rule XLII.** — The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

**Rule XLIII.** — Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer; that is to say —

"1. Whether, &c.

"2. Whether, &c."

**Rule XLIV.** — A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

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\* See Rev. Stat. § 858.

**Rule XLV.** — No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

**Rule XLVI.** — In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

#### PARTIES TO BILLS.

**Rule XLVII.** — In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

**Rule XLVIII.** — Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

**Rule XLIX.** — In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors.

or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

**Rule L.** — In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

**Rule LI.** — In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

**Rule LII.** — Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following, (that is to say:) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

**Rule LIII.** — If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

**NOMINAL PARTIES TO BILLS.**

**Rule LIV.** — Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

**Rule LV.** — Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

**BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.**

**Rule LVI.** — Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

**Rule LVII.** — Whenever any suit in equity shall become defective, from any event happening after the filing of the bill, (as, for example, by change of interest in the parties,) or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

**Rule LVIII.** — It shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

#### ANSWERS.

**Rule LIX.** — Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a State or Territory, or before any notary public.

#### AMENDMENT OF ANSWERS.

**Rule LX.** — After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be re-sworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge granting the same, may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

**EXCEPTIONS TO ANSWERS.**

**Rule LXI.** — After an answer is filed on any rule day the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

**Rule LXII.** — When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

**Rule LXIII.** — Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and sha' enter, as of course, in the order book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient: *Provided, however,* That the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

**Rule LXIV.** — If at the hearing the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise, the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his

putting in such answer and complying with such other terms as the court or judge may direct.

**Rule LXV.** — If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

#### REPLICATION AND ISSUE.

**Rule LXVI.** — Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

#### TESTIMONY — HOW TAKEN.

**Rule LXVII.** — After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court, or by a judge thereof; and the presiding judge of the court exercising jurisdiction may either in term time or vacation vest in the clerk of the court general power to name commissioners to take testimony. Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined



shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner, if he so request, to be furnished with a copy of the pleadings; such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; *provided*, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; *provided*, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; *provided*, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the records the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions, and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties of the time and place of the

**examination** for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

**Rule LXVIII.** — Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

**Rule LXIX.** — Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court

or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions, containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order books or indorsed upon the deposition or testimony.

#### TESTIMONY DE BENE ESSE.

**Rule LXX.** — After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any one of them is a single witness to a material fact the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

#### FORM OF THE LAST INTERROGATORY.

**Rule LXXI.** — The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated, in substance, thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

#### CROSS-BILL.

**Rule LXXII.** — Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by

the party filing the cross-bill, at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

#### REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

**Rule LXXIII.** — Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

**Rule LXXIV.** — Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the cost of the party procuring the reference.

**Rule LXXV.** — Upon every such reference it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reason for any delay.

**Rule LXXVI.** — In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to,

so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

**Rule LXXVII.** — The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *vivâ voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

**Rule LXXVIII.** — Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon, by order of the court or any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *vivâ voce* when produced in open court, if the court shall in its discretion deem it advisable.

**Rule LXXIX.** — All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts

so brought in, shall be at liberty to examine the accounting party *vivâ voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

**Rule LXXX.** — All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

**Rule LXXXI.** — The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *vivâ voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

**Rule LXXXII.** — The Circuit Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment); and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

#### EXCEPTIONS TO REPORT OF MASTER.

**Rule LXXXIII.** — The master as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for

hearing before the court if the court is then in session; or if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

**Rule LXXXIV.** — And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs — the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

#### DECREES.

**Rule LXXXV.** — Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a re-hearing.

**Rule LXXXVI.** — In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz: " [Here insert the decree or order.]

#### GUARDIANS AND PROCHEIN AMIS.

**Rule LXXXVII.** — Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

**Rule LXXXVIII.** — Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not appar-

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ent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

**Rule LXXXIX.** — The Circuit Courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge of the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

**Rule XC.** — In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

**Rule XCI.** — Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

**Rule XCII.** — *Ordered* (December Term, 1863), That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

### INJUNCTIONS.

**Rule XCIII.** — When an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or



judge who took part in the decision of the cause, he may in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

#### **BILL BY STOCKHOLDER.**

**Rule XCIV.** — Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

See also the following sections of the act of June 1, 1872:

Sec. 7. That whenever notice is given of a motion for an injunction out of a Circuit or district court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: Provided, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

Sec. 13. That when in any suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an

**inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such a manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.**

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THE  
BANKRUPTCY ACT OF 1898  
WITH AMENDMENTS OF 1903.

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AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY  
THROUGHOUT THE UNITED STATES.

[APPROVED JULY 1, 1898; AMENDMENTS APPROVED FEB. 5, 1903.]

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*Be it enacted by the Senate and House of Representatives of the  
United States of America, in Congress assembled:*

CHAPTER I.

DEFINITIONS.

**SECTION 1. Meaning of Words and Phrases.**—*a* The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by indi-

EXPLANATION.—Matter in *italics* is new.

viduals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred, or anyone acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and



different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women; (29) words importing the plural number may be applied to and mean only a single person or thing; (30) words importing the singular number may be applied to and mean several persons or things.

## CHAPTER II.

### CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

§ 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, *and allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services*; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; (8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions

between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

## CHAPTER III.

### BANKRUPTS.

§ 3. **Acts of Bankruptcy.**— *a* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, *or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States*; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

*b* A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

*c* It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

*d* Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

*e* Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

**§ 4. Who May Become Bankrupts.**—*a* Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

*b* Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts. *The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.*

**§ 5. Partners.**—*a* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

*b* The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

*c* The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

*d* The trustee shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

*e* The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

*f* The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual

estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

*g* The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

*h* In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

**§ 6. Exemptions of Bankrupts.**—*a* This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

**§ 7. Duties of Bankrupts.**—*a* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this act, coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all

matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

PROVIDED, HOWEVER, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

**§ 8. Death or Insanity of Bankrupts.**—*a* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and conclude in the same manner, so far as possible, as though he had not died or become insane: PROVIDED, That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

**§ 9. Protection and Detention of Bankrupts.**—*a* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act.

*b* The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

**§ 10. Extradition of Bankrupts.**—*a* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

**§ 11. Suits by and against Bankrupts.**—*a* A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

*b* The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

*c* A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

*d* Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

**§ 12. Compositions, when Confirmed.**—*a* A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

*b* An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

*c* A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

*d* The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

*e* Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

**§ 13. Compositions, when Set Aside.**—*a* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practiced in the pro-



curing of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

**§ 14. Discharges, when Granted.**— *a* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

*b* The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) *obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit*; or (4) *at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors*; or (5) *in voluntary proceedings been granted a discharge in bankruptcy within six years*; or (6) *in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court*.

*c* The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

**§ 15. Discharges, when Revoked.**— *a* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

**§ 16. Co-Debtors of Bankrupts.**— *a* The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

**§ 17. Debts not Affected by a Discharge.**— *a* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are *liabilities for obtaining property*

by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, *or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation*; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

## CHAPTER IV.

### COURTS AND PROCEDURE THEREIN.

§ 18. **Process, Pleadings, and Adjudications.**— *a* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits *to enforce a legal or equitable lien* in courts of the United States, *except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time.*

*b* The bankrupt, or any creditor, may appear and plead to the petition within *five* days after the return day, or within such further time as the court may allow.

*c* All pleadings setting up matters of fact shall be verified under oath.

*d* If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

*e* If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

*f* If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

*g* Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

§ 19. **Jury Trials.**— *a* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

*b* If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

*c* The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

§ 20. **Oaths, Affirmations.**—*a* Oaths required by this act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

*b* Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

§ 21. **Evidence.**—*a* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt *and his wife*, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: *Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.*

*b* The right to take depositions in proceedings under this act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

*c* Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

*d* Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

*e* A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

*f* A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of

the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

*g* A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

§ 22. **Reference of Cases after Adjudication.**— *a* After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

*b* The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

§ 23. **Jurisdiction of United States and State Courts.**— The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

*b* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e.*

*c* The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act.

§ 24. **Jurisdiction of Appellate Courts.**— *a* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

*b* The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the

proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

**§ 25. Appeals and Writs of Error.**—*a* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

*b* From any final decision of a court of appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.

*c* Trustees shall not be required to give bond when they take appeals or sue out writs of error

*d* Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

**§ 26. Arbitration of Controversies.**—*a* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

*b* Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

*c* The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.

**§ 27. Compromises.**—*a* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

§ 28. **Designation of Newspapers.**— *a* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this act and orders which the court may direct to be published shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

§ 29. **Offenses.**— *a* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

*b* A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

*c* A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offense of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

*d* A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense.

§ 30. **Rules, Forms, and Orders.**— *a* All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

§ 31. **Computation of Time.**— *a* Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall

on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

§ 32. **Transfer of Cases.**— *a* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.



## CHAPTER V.

### OFFICERS, THEIR DUTIES AND COMPENSATION.

§ 33. **Creation of Two Officers.**—*a* The offices of referee and trustee are hereby created.

§ 34. **Appointment, Removal, and Districts of Referees.**—*a* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

§ 35. **Qualifications of Referees.**—*a* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

§ 36. **Oaths of Office of Referees.**—*a* Referees shall take the same oath of office as that prescribed for judges of United States courts.

§ 37. **Number of Referees.**—*a* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

§ 38. **Jurisdiction of Referees.**—*a* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges,

as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

**§ 39. Duties of Referees.**—*a* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

*b* Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

**§ 40. Compensation of Referees.**—*a* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of *fifteen* dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and *twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration*, and from estates which have been administered before them one per centum commissions on *all moneys disbursed to creditors by the trustee*, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

*b* Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

*c* In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

**§ 41. Contempts before Referees.**—*a* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

*b* The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

**§ 42. Records of Referees.**—*a* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

*b* A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

*c* The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

**§ 43. Referee's Absence or Disability.**—*a* Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

**§ 44. Appointment of Trustees.**—*a* The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there

is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

§ 45. **Qualifications of Trustees.**—*a* Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

§ 46. **Death or Removal of Trustees.**—*a* The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

§ 47. **Duties of Trustees.**—*a* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estate; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

*b* Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

*c* The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the

*filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings.*

**§ 48. Compensation of Trustees.**—*a* Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered such commissions on *all moneys disbursed by them* as may be allowed by the courts, not to exceed *six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars.* And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

*b* In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

*c* The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

**§ 49. Accounts and Papers of Trustees.**—*a* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

**§ 50. Bonds of Referees and Trustees.**—*a* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

*b* Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

*c* The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

*d* The court shall require evidence as to the actual value of the property of sureties.

*c* There shall be at least two sureties upon each bond.

*f* The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

*g* Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

*h* Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States for the use of any person injured by a breach of their conditions.

*i* Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this act, of whose estates they are respectively trustees.

*j* Joint trustees may give joint or several bonds.

*k* If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

*l* Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

*m* Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

**§ 51. Duties of Clerks.**— *a* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee, and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

**§ 52. Compensation of Clerks and Marshals.**— *a* Clerks shall respectively receive as full compensation for their services to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

*b* Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their service in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

§ 53. **Duties of Attorney-General.**—*a* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid and the expenses of administering such estates; and such other like information as he may deem important.

§ 54. **Statistics of Bankruptcy Proceedings.**—*a* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

## CHAPTER VI.

### CREDITORS.

**§ 55. Meetings of Creditors.**— *a* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

*b* At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

*c* The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act.

*d* A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

*e* The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

*f* Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

**§ 56. Voters at Meetings of Creditors.**— *a* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

*b* Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess.



§ 57. **Proof and Allowance of Claims.**—*a* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

*b* Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

*c* Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee if the case has been referred.

*d* Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

*e* Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

*f* Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

*g* The claims of creditors who have received preferences, *voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given*, shall not be allowed unless such creditors shall surrender such preferences, *conveyances, transfers, assignments, or incumbrances*.

*h* The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

*i* Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

*j* Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.

*k* Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

*l* Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof if rejected only in part.

*m* The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

*n* Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: PROVIDED, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer.

**§ 58. Notice to Creditors.**—*a* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy, and (8) the proposed dismissal of the proceedings.

*b* Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

*c* All notices shall be given by the referee, unless otherwise ordered by the judge.

**§ 59. Who may File and Dismiss Petitions.**—*a* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

*b* Three or more creditors who have provable claims against any person which amount in the aggregate in excess of the value of securities held by

them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

*c* Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

*d* If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

*e* In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

*f* Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

*g* A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

**§ 60. Preferred Creditors.**—*a* A person shall be deemed to have given a preference if, being insolvent, he has, *within four months before the filing of the petition, or after the filing of the petition and before the adjudication*, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.*

*b* If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. *And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have*

*had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

*c* If a creditor has been preferred, and afterwards in good faith gives, the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

*d* If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

## CHAPTER VII.

### ESTATES.

**§ 61. Depositories for Money.**—*a* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

**§ 62. Expenses of Administering Estates.**—*a* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

**§ 63. Debts which may be Proved.**—*a* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

*b* Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

**§ 64. Debts which have Priority.**—*a* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers

for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

*b* The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, *where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery*; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

*c* In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

**§ 65. Declaration and Payment of Dividends.**—*a* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

*b* The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order: *Provided, That the first dividend shall not include more than fifty per centum of the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as probably will be allowed: And provided further, That the final dividend shall not be declared within three months after the first dividend shall be declared.*

*c* The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

*d* Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such court shall be paid any amounts.

*e* A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act.

**§ 66. Unclaimed Dividends.**—*a* Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

*b* Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: PROVIDED, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

**§ 67. Liens.**—*a* Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

*b* Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

*c* A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall

be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

*d* Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

*e* That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

*f* That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: **PROVIDED**, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona



fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

§ 68. **Set-offs and Counterclaims.**—*a* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

*b* A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

§ 69. **Possession of Property.**—*a* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

§ 70. **Title to Property.**—*a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: PROVIDED, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors par-

icipating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*

f Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

§ 71. *That the clerks of the several district courts of the United States shall prepare and keep in their respective offices complete and convenient indexes of all petitions and discharges in bankruptcy heretofore or hereafter filed in the said courts, and shall, when requested so to do, issue certificates of search certifying as to whether or not any such petitions or discharges have been filed; and said clerks shall be entitled to receive for such certificates the same fees as now allowed by law for certificates as to judgments in said courts: Provided, That said bankruptcy indexes and dockets, shall at all times be open to inspection and examination by all persons or corporations without any fee or charge therefor.*

§ 72. *That neither the referee nor the trustee shall in any form or guise receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act.*

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**THE TIME WHEN THIS ACT SHALL GO INTO EFFECT.**

The original act of 1898 provided as follows:

*a* This act shall go into full force and effect upon its passage: **PROVIDED, HOWEVER,** That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

*b* Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.

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The amendatory act of 1903 provides as follows:

*§ 19. That the provisions of this amendatory act shall not apply to bankruptcy cases pending when this act takes effect, but such cases shall be adjudicated and disposed of conformably to the provisions of the said act of July first, eighteen hundred and ninety-eight.*



# INDEX TO BANKRUPTCY ACT OF 1898.

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# THE BANKRUPTCY ACT OF 1867.

(WITH AMENDMENTS.)

## COURTS OF BANKRUPTCY.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the several District Courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this Act.

The said courts shall be always open for the transaction of business under this Act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting in chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

And the jurisdiction hereby conferred shall extend —

To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy;

To the collection of all the assets of the bankrupt;

To the ascertainment and liquidation of the liens and other specific claims thereon;

To the adjustment of the various priorities and conflicting interests of all parties;

And to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors;

And to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

*(Provided,* That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the state where such bankrupt resides, having jurisdiction of claims of such nature and amount.)\*

The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein in equity.

Said courts may sit for the transaction of business in bankruptcy at any place in the district, of which place, and the time of holding court, they shall have given notice, as well as at the places designated by law for holding such courts.

§ 2. *And be it further enacted,* That the several Circuit Courts of the United States within and for the districts where the proceedings in bankruptcy shall be pending shall have a general superintendence and jurisdiction of all cases

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\* So amended by act of 22 June, 1874, ch. 390, § 2, 18 Stat. 176.

and questions arising under this Act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity.

The powers and jurisdiction hereby granted may be exercised either by said court, or by any justice thereof, in term time or vacation.

\*Said Circuit Courts shall also have *concurrent jurisdiction* with the District Courts of the same district, of all suits at law, or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in such assignee;

(R. S., § 4979. — The several Circuit Courts shall have, within each district, concurrent jurisdiction with the district court of any district, whether the powers and jurisdiction of a Circuit Court have been conferred on such district court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt, transferable to or vested in such assignee.)

But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

#### OF THE ADMINISTRATION OF THE LAW IN COURTS OF BANKRUPTCY.

§ 3. *And be it further enacted*, That it shall be the duty of the judges of the District Courts of the United States within and for the several districts to appoint in each Congressional District in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the District Court in the performance of his duties under this Act.

No person shall be eligible to such appointment unless he be a counsellor of said court, or of some one of the courts of record of the State in which he resides.

Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof.

And he shall, in open court, take and subscribe the oath prescribed in the act entitled "An Act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also, that he will not during his continuance in office be, directly or indirectly, interested in, or

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\*As amended by act of June 22, 1874, this paragraph appears in R. S., § 4979.

benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy in either the District or Circuit Court in his district.

§ 4. *And be it further enacted*, That every register in bankruptcy, so appointed and qualified shall have power, and it shall be his duty —

To make adjudication of bankruptcy;

To receive the surrender of any bankrupt;

To administer oaths in all proceedings before him;

To hold and preside at meetings of creditors;

To take proof of debts;

To make all computations of dividends, and all orders of distribution, and to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case;

To audit and pass accounts of assignees;

To grant protection;

To pass the last examination of any bankrupt in cases whenever the assignee or a creditor does not oppose;

And to sit in chambers and dispatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct;

And he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the District Court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute book, to be kept in his office;

And any register of the court may act for any other register thereof.

*Provided, however*, That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge;

But in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge.

\* No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy, in either the Circuit or District Court of his district, nor in an appeal therefrom, nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts.

(R. S., Sec. 4996.\* No register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in

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\* So amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts.)

The fees of said registers, as established by this Act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this Act.

§ 5. *And be it further enacted*, That the judge of the District Court may direct a register to attend at any place within the district, for the purpose of hearing such voluntary applications under this Act as may not be opposed; of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this Act; and the travelling and incidental expenses of such register, and of any clerk or other officer attending him, incurred in so acting, shall be settled by said court in accordance with the rules prescribed under the tenth section of this Act, and paid out of the assets of the estate in respect of which such register has so acted; or, if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge; and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the District Court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents:

*Provided always*, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing and be signed by him, and shall be filed in the clerk's office as part of the proceedings.

Such register shall be subject to removal by the judge of the District Court;

And all vacancies occurring by such removal, or by resignation, change of residence, death, or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

§ 6. *And be it further enacted*, That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court.

In any bankruptcy, or in any other proceedings within the jurisdiction of the court under this Act, the parties concerned, or submitting to such jurisdiction, may, at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court; and the judgment of the court shall be final, unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this Act.

The parties may also, if they think fit, agree, that upon the question or ques-

tions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

§ 7. *And be it further enacted*, That parties and witnesses summoned before a register shall be bound to attend, in pursuance of such summons, at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpoena;

And all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury.

If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such examination; and such person shall also be liable to be punished for contempt.

§ 8. *And be it further enacted*, That appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed to said Circuit Courts from said District Courts in cases at law under the jurisdiction created by this act when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court for the same district; but no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed, and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from.

The appeal shall be entered at the term of the Circuit Court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same.

But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the District Court as if no appeal had been taken.

And no appeal shall be allowed unless the appellant, at the time of claiming the same, shall give bond in manner now required by law in cases of such appeals.

No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

§ 9. *And be it further enacted*, That in cases arising under this Act, no appeal or writ of error shall be allowed in any case from the Circuit Courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed \* (two thousand dollars).

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\* Amended by act of Feb. 6th, 1875, ch. 77, sec. 3, to \$5,000.00.

§ 10. *And be it further enacted*, That the Justices of the Supreme Court of the United States, subject to the provisions of this Act, shall frame general orders for the following purposes:

For regulating the practice and procedure of the District Courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this Act;

For regulating the duties of the various officers of said courts;

(\*For regulating the fees payable, and the charges and costs to be allowed, except such as are established by this Act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings).

For regulating the fees payable and the charges and costs to be allowed, with respect to all proceedings in bankruptcy before such courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings.

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this Act into effect.

(† And said justices shall have power under said sections, by general regulations, to simplify, and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided.)

After such general orders shall have been so framed, they, or any of them, may be rescinded or varied, and other general orders may be framed in manner aforesaid;

And all such general orders so framed shall, from time to time, by the Justices of the Supreme Court, be reported to Congress, with such suggestions as said Justices may think proper.

#### VOLUNTARY BANKRUPTCY — COMMENCEMENT OF PROCEEDINGS.

§ 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this Act exceeding the amount of three hundred dollars, shall apply by petition, addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of this Act;

And shall annex to his petition a schedule (words “ and inventory and valuation ” added by act of June 22, 1874), verified by oath before the court, or before a register in bankruptcy, or before one of the commissioners of the Circuit Court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each cred-

\* Amended by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184, to read as in the following paragraph.

† So added by act of 22 June, 1874, ch. 390, sec. 18, 18 Stat. 184.

itor, if known to the debtor, and, if not known, the fact to be so stated, and the sum due to each creditor; also the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same;

And shall also annex to his petition an accurate inventory,\* verified in like manner, of all his estate, both real and personal, assignable under this Act, describing the same, and stating where it is situated, and whether there are any, and, if so, what encumbrances thereon;

The filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt;

*Provided*, That all citizens of the United States petitioning to be declared bankrupt shall, in filing such petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy.

And the judge of the District Courts, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other notice to any persons concerned as the warrant specifies, which notice shall state:

*First*. That a warrant in bankruptcy has been issued against the estate of the debtor.

*Second*. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

*Third*. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

(† But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper, or newspapers, to all such creditors, whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.)

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\* "And valuation," so amended Act. of June 22, 1874.

† So amended by act of 22 June, 1874, ch. 390, sec. 5, 18 Stat. 179.

## OF ASSIGNMENTS AND ASSIGNEES.

§ 12. *And be it further enacted*, That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

§ 13. *And be it further enacted*, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts.

If no choice is made by the creditors at said meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees.

If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy.

All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties;

The bond shall be approved by the judge or register by his endorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party.

If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

§ 14. *And be it further enacted*, That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on *mesne* process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings:

*Provided, however*, That there shall be excepted from the operation of the provisions of this section —

The necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of



the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars;

And also the wearing apparel of such bankrupt, and that of his wife and children;

And the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States;

And such other property as now is, or hereafter shall be exempted from attachment, or seizure, or levy on execution by the laws of the United States;

And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four:

*Provided*, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees;

And in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Act;

And the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court:

*And provided further*, That no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations, and otherwise valid, and duly recorded, pursuant to any statute of the United States or of any State, shall be invalidated or affected hereby.

And all the property conveyed by the bankrupt in fraud of his creditors;

All rights in equity, choses in action, patents and patent rights and copy-rights;

All debts due him, or any person for his use, and all liens and securities therefor;

And all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention or of injury to the property of the bankrupt; and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee;

And he may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt.

And a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold,

**sue for, and recover the property of the bankrupt, as hereinbefore mentioned; but no property held by the bankrupt in trust shall pass by such assignment.**

No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so.

No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon;

\* And no suit in which the assignee is a party shall be abated by his death or removal from office, but the same may be prosecuted and defended by his successors, or by the surviving or remaining assignee, as the case may be.

The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other encumbrances.

The debtor shall also, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper, to enable the assignee to possess himself fully of all the assets of the bankrupt.

The assignee shall immediately give notice of his appointment by publication, at least once a week for three successive weeks, in such newspaper as shall, for that purpose, be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside,

And shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded;

And the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.

§ 15. *And be it further enacted,* That the assignee shall demand and receive from any and all persons holding the same, all the estate assigned, or intended to be assigned, under the provisions of this Act;

And he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors;

(R. S., sec. 5062a (22 June, 1874, ch. 390, sec. 1, 18 Stat. 178.)— That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt. *Provided,* That such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.)

But upon petition of any person interested, and for cause shown, the court

may make such order concerning the time, place, and manner of sale, as will, in its opinion, prove to the interest of the creditors;

And the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

(R. S., sec. 5062b (22 June, 1874, ch. 390, sec. 4, 18 Stat. 178).— That, unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places, as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court on application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a resale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such installments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell, or dispose of, or in any manner, fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell, or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services, in connection with such bankrupt's estate, and upon conviction thereof, before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid, shall, upon conviction, be liable to a like punishment. That the assignee shall report under oath, to the court, at least as often as once in three months, the condition of the estate in his charge and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the account of any assignee, he shall be required to account for all interest, benefit or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to

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receive, directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall wilfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.)

§ 16. *And be it further enacted*, That the assignee shall have the like remedy to recover all said estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered, and no assignment had been made.

If, at the time of the commencement of the proceedings in bankruptcy an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him.

No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving, or remaining, or new assignee, as the case may be, he shall be admitted to prosecute the suit, in like manner and with like effect as if it had been originally commenced by him.

In suits prosecuted by the assignee a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

§ 17. *And be it further enacted*, That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts.

When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank, upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon.

He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court.

He shall be allowed, and may retain, out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

He may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him and the other party to the controversy, and may, under such direction, compound and settle any such contro-

versy by agreement with the other party, as he thinks proper and most for the interest of the creditors.

§ 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient.

At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee.

An assignee may, with the consent of the judge, resign his trust, and be discharged therefrom.

Vacancies caused by death, or otherwise, in the office of assignee may be filled by appointment of the court, or, at its discretion, by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof, in writing, to all known creditors, and by such person as the court shall direct.

The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

When, by death, or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen.

Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate.

And the court may make all orders which it may deem expedient to secure the proper fulfillment of the duties of any former assignee, and the rights and interests of all persons interested in the estate.

No person who has received any preference contrary to the provisions of this Act shall vote for or be eligible as assignee.

But no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility.

An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.

#### OF DEBTS AND PROOF OF CLAIMS.

§ 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of contract, may be proved against the estate of the bankrupt.

All demands against the bankrupt for or on account of any goods or chattels

wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest.

If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.

In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced.

And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same, either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules.

Where the bankrupt is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the Court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

No debts other than those above specified shall be proved or allowed against the estate.

§ 20. *And be it further enacted*, That in all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition.

(\* Or in cases of compulsory bankruptcy, after the act of bankruptcy upon or

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\* So added by act of 22 June, 1874, ch. 390, sec. 6, 18 Stat. 179.

in respect of which the adjudication shall be made, and with a view of making such set-off.)

When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct;

Or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt.

If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

§ 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby.

(\* But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.)

And no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined.

And any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge: *Provided*, There be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge: *And provided, also*, That if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid.

If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect

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\* So added by act of 22 June, 1874, ch. 390, sec. 7, 18 Stat. 179.)

of such distinct contracts against the estates respectively liable upon such contracts.

§ 22. *And be it further enacted*, That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial districts where such creditors, or either of them, reside, or before any commissioner of the Circuit Court authorized to administer oaths in any district.

(Sec. 5076 a (22 June 1874, ch. 390, sec. 20, 18 Stat. 186). — That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof. in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.)

(Sec. 5076 b (Act of August 15, 1876, ch. 304, 19 Stat. 206). — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States Circuit Court may now lawfully take or do.)

To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath, or solemn affirmation, before the proper register or commissioner, setting forth —

The demand;

The consideration thereof;

Whether any and what securities are held therefor

And whether any and what payments have been made thereon;

That the sum claimed is justly due from the bankrupt to the claimant;

That the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other than that by him set forth;

That the claim was not procured for the purpose of influencing the proceedings under this act;

And that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim, or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled;

And no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Such oath, or solemn affirmation shall be made by the claimant testifying of his own knowledge, unless he is absent from the United States, or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testify-



ing to the best of his knowledge, information, and belief, and setting forth his means of knowledge, or, if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive further pertinent evidence, either for or against the admission of the claim.

Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer.

If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received, stating the time and receipt of such proof, and the amount and nature of the debts, which books shall be open to the inspection of all the creditors.

The court may, on the application of the assignee, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

§ 23. *And be it further enacted*, That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity, or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen.

Any person who, after the approval of this Act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this Act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.

The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers;

And any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

§ 24. *And be it further enacted*, That a supposed creditor who takes an appeal to the Circuit Court from the decision of the District Court rejecting his claim, in whole or in part, shall, upon entering his appeal in the Circuit Court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in an action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary,

be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate.

A bill of exchange, promissory note, or other instrument used in evidence upon the proof of a claim, and left in court, or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the clerk of the court, who shall endorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

§ 25. *And be it further enacted*, That when it appears to the satisfaction of the court that the estate of the debtor or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of;

And whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent, or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of;

And the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts.

But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

§ 26. *And be it further enacted*, That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating —

To the disposal or condition of his property;

To his trade and dealings with others, and his accounts concerning the same;

To all debts due to or claimed from him;

And to all other matters concerning his property and estate, and the due settlement thereof according to law;

Which examination shall be in writing, and shall be signed by the bankrupt, and be filed with the other proceedings.

And the court may, in like manner, require the attendance of any other person as a witness; and if such person shall fail to attend on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy for examination as such witness.

If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailor, or any officer in whose custody he may be; or may direct the examination to be had, taken, and certified, at such

time and place and in such manner as the court may deem proper. and with like effect as if such examination had been in court.

The bankrupt shall, at all times until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court.

If the bankrupt is without the district, and unable to return and personally attend at any of the times, or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by wilful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do with like effect as if he had not been in default.

He shall also be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property so that the same shall conform to the facts.

For good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife.

No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action unless the same is founded on some debt or claim from which his discharge or bankruptcy would not release him.

§ 27. *And be it further enacted*, That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate *pro rata*, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labors performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full;

*Provided*, That any debt proved by any person liable as bail, surety, guarantor, or otherwise for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given;

And the assignee shall then report and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath;

And he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court;

He shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt, as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands.

At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one-half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

In case a dividend is ordered the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim, the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

§ 28. *And be it further enacted*, That the like proceedings shall be had at the expiration of the next three months, or earlier if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted the same shall be divided in manner aforesaid.

Further dividends shall be made in like manner as often as occasion requires;

And after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order.

No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter.

Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth

of such account, and, if found correct, he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt.

The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts.

In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case, on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars; and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

If, by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held.

In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:—

*First.* The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

*Second.* All debts due to the United States, and all taxes and assessments under the laws thereof.

*Third.* All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.

*Fourth.* Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

*Fifth.* All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided*, That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

#### OF THE BANKRUPT'S DISCHARGE AND ITS EFFECT.

§ 29. *And be it further enacted*, That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proven against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days,\* and within one year from the

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\* Amended so as to read "and before the final disposition of the cause." (Act of July 26, 1876, ch. 234, sec. 1.)

**adjudication of bankruptcy**, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

No discharge shall be granted, or, if granted, be valid —

If the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact;

Or if he has concealed any part of his estate or effects, or any books or writings relating thereto;

Or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this Act;

Or if he has caused, permitted, or suffered any loss, waste, or destruction thereof;

Or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized, on execution;

Or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities;

Or has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors;

Or has removed, or caused to be removed, any part of his property from the district with intent to defraud his creditors;

Or if he has given any fraudulent preference contrary to the provisions of this Act;

Or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property;

Or has lost any part thereof in gaming;

Or has admitted a false or fictitious debt against his estate;

Or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge;

Or if, being a merchant or tradesman, he has not, subsequently to the passage of this Act, kept proper books of account;

Or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation;

Or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any

creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts;

Or if he has been convicted of any misdemeanor under this Act, or has been guilty of any fraud whatever contrary to the true intent of this Act;

And before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

§ 30. *And be it further enacted*, That no person who shall have been discharged under this Act, and shall afterwards become bankrupt, on his own application, shall be again entitled to a discharge, whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims, is filed at or before the time of application for discharge.

But a bankrupt, who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

§ 31. *And be it further enacted*, That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the Court may in its discretion order any question of fact so presented to be tried at a stated session of the District Court.

§ 32. *And be it further enacted*, That if it shall appear to the Court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the Court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows:

District Court of the United States, District of —.

Whereas — —, has been duly adjudged a bankrupt under the Act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the Court that said — — be forever discharged from all debts and claims which by said Act are made provable against his estate, and which existed on the — day of —, on which day the petition for adjudication was filed by or [or against] him excepting such debts, if any, as are by said Act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court at —, in the said district, this — day of —, A. D. —.

[Seal.]

—, Judge.

§ 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act; but the debt may

be proved, and the dividend thereon shall be a payment on account of said debt;

And no discharge granted under this Act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint-contractor, indorser, surety, or otherwise.

And in all proceedings in bankruptcy commenced after one year from the time this Act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, ("upon which he is liable as the principal debtor." So amended, Act of July 27, 1868, ch. 258, sec. 1), unless the assent in writing of a majority in number and value of his creditors who have proved their claims, is filed in the case at or before the time of application for discharge.

(R. S., sec. 5112 a (22 June, 1874, ch. 390, sec. 9, 18 Stat. 180). — That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor without the assent of at least one-fourth of his creditors in number, and one-third in value. And the provision in section five thousand one hundred and twelve (thirty-three of said act of March second, eighteen hundred and sixty-seven) requiring fifty per centum of such assets is hereby repealed.)

§ 34. *And be it further enacted*, That a discharge duly granted under this Act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth *in hæc verba*, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge;

*Always provided*, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same.

Said application shall be in writing; shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts; but said application shall be subject to amendment at the discretion of the court.

The court shall cause reasonable notice of said application to be given to said



bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper.

If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts, and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

#### PREFERENCES AND FRAUDULENT CONVEYANCES DECLARED VOID.

§ 35. *And be it further enacted*, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent\* (and that such attachment, payment, pledge, assignment, or conveyance, is made in fraud of the provisions of this Act—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited).

And if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and† that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this Act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this Act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale,

\* Amended so as to read: "Knowing that such attachment, sequestration, seizure, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this Title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. And nothing in said section five thousand one hundred and twenty-eight (thirty-five) shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan."—Act of June 22, 1874. R. S. § 5128.

† (The word "knowing" inserted by act of June 22, 1874, ch. 390, sec. 11.)

assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud.

Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for, or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void;

And if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offending shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained, to be recovered by the assignee for the benefit of the estate.

(R. S., sec. 5130 *a* (22 June, 1874, ch. 390, sec. 10, 18 Stat. 180). — That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section five thousand one hundred and twenty-eight (thirty-five) of the act to which this is an amendment, is hereby changed to two months, but this provision shall not take effect until two months after the passage of this act, and in the cases aforesaid, the period of six months mentioned in said section five thousand one hundred and twenty-nine (thirty-five) is hereby changed to three months, but this provision shall not take effect until three months after the passage of this act.)

#### BANKRUPTCY OF PARTNERSHIPS AND OF CORPORATIONS.

§ 36. *And be it further enacted*, That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this Act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted;

And all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts;

And the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof;

And after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors;

And if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors;

And if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the sepa-

rate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy;

And the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts;

And the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this Act;

And in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

§ 37. *And be it further enacted*, That the provisions of this Act shall apply to all moneyed, business, or commercial corporations and joint-stock companies, and that upon the petition of any officer of any such corporation or company duly authorized by a vote of a majority of the corporators present, at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company, made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors;

And all the provisions of this Act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company in relation to the same matters concerning the corporation or company, and the money and property thereof.

All payments, conveyances, and assignments declared fraudulent and void by this Act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint-stock company, or to any person, or officer, or member thereof;

*Provided*, That whenever any corporation by proceedings under this Act shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporation in the manner provided in this Act in respect to natural persons.

#### OF DATES AND DEPOSITIONS.

§ 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register, in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act;

The proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket

only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection.

Copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated.

Evidence of examination in any of the proceedings under this Act may be taken before the court, or a register in bankruptcy, *viva voce* or in writing, before a commissioner of the Circuit Court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony, in the same manner as in suits in equity in the Circuit Court.

### INVOLUNTARY BANKRUPTCY.

§ 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this Act,

Shall depart from the State, district, or territory of which he is an inhabitant, with intent to defraud his creditors;

Or, being absent, shall, with such intent, remain absent;

Or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this Act;

Or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process.

Or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors;

Or who has been arrested and held in custody under or by virtue of mesne process or execution issued out of any court of any State, district or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this Act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days;

Or has been actually imprisoned for more than \*(seven) days in a civil action, founded on contract, for the sum of one hundred dollars or upwards.

Or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency shall make any payment, gift, grant, sale, conveyance,† (or transfer of money, or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process), with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this Act;

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\* (Amended to "twenty." R. S., sec. 5021; Act of June 22, 1874).

† Amended so as to read, "Or transfer of money or other property, estate rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process."

\* (Or who, being a banker, merchant, or trader, has stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days);

Shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors,† (the aggregate of whose debts provable under this Act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed.)

‡ And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this Act: *Provided*, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this Act was intended, or that the debtor was insolvent;

And such creditor shall not be allowed to prove his debt in bankruptcy.

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\* Words in parentheses amended so as to read, "or who, being a bank, banker, broker, merchant, trader, (j) manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped, or suspended and not resumed payment, within a period of forty days of his commercial paper, (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days, to pay any depositor upon demand of payment lawfully made. R. S., sec. 5021, Act of June 22, 1874.)

† Words in parentheses amended so as to read, "who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts (i) provable under this act amounts to at least one-third of the debts so provable. R. S. sec. 5021, Act of June 22, 1874.)

‡ In the Revised Statutes, section 5021, the following was inserted before and instead of this paragraph: *Provided*, also, That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid, according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this Act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith), shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding in cases heretofore commenced, twenty days, and in cases hereafter commenced ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited,

§ 40. *And be it further enacted*, That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted;

And may also, by its injunction, restrain the debtor, and any other person, in the meantime, from making any transfer or disposition of any of the debtor's property not excepted by this Act from the operation thereof, and from any interference therewith;

And if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged bankrupt and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debt or, and safely keep the same until the further order of the court.

A copy of the petition and of such order to show cause shall be served on such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode;

Or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication, in such manner as the judge may direct.

No further proceedings, unless the debtor appear and consent thereto, shall

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the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money (m) or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid. So amended by act of July 26, 1876, ch. 234, sec. 1, 19 Stat. 102.

be had until proof shall have been given, to the satisfaction of the court, of such service or publication;

\* And if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.

§ 41. *And be it further enacted*, That on such return day, or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy;

† (Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district returnable within ten days before him, for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause.)

And if, upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover his costs.

§ 42. *And be it further enacted*, That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor,

The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore (See amendment, Act June 22, 1874), providing for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order, or notice thereof, as shall by the order be prescribed, to make and

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\* Amended by act of 22 June, 1874, ch. 390, sec. 13, 18 Stat. 182, to read:

"And if, on return day of the order to show cause as aforesaid the court shall be satisfied that the requirement of section five thousand and twenty-one (thirty-nine) of said act, as to the number and amount of petitioning creditors, has been complied with, or if within the time provided for in section five thousand and twenty-one (thirty-nine) of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors, and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

† So amended by act of 22 June, 1874, ch. 390, sec. 14, 18 Stat. 182.)

deliver, or transmit by mail, post-paid, to the messenger, a schedule\* of the creditors and an inventory of his estate in the form, and verified in the manner required of a petitioning debtor by section thirteen.

If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause;

And if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

If the petitioning creditor shall not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.

§ 43. *And be it further enacted*, That if, at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take, and hold, and distribute the estate, under the direction of such committee.

If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed and that the interests of the creditors will be promoted thereby, it shall confirm the same;

And upon the execution and filing, by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees, according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed;

And such consent and the proceedings thereunder shall be as binding in all respects on any creditor, whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it;

And the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors; and the said trustees shall pro-

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(\* Words " and valuation " added, Act of June 22, 1874.)



ceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors;

And the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this Act; and the said trustees shall have all the rights and powers of assignees in bankruptcy.

The court, on the application of such trustees, shall have power to summon and examine, on oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers, in the same manner as in other proceedings in bankruptcy under this act;

And the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this Act.

If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings;

And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Act.

(R. S., sec. 5103 *a* (22 June, 1874, ch. 390, sec. 17, 18 Stat. 182). — That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor, of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or assign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in

his behalf, shall produce to the meeting a statement showing the whole value of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by a resolution passed in the matter and under the circumstances aforesaid, add to or vary the provisions of, any composition previously accepted by them, without prejudice to any person taking interest under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case be computed in calculating periods of time prescribed by said act.)

#### PENALTIES AGAINST BANKRUPTS.

§ 44. *And be it further enacted*, That from and after the passage of this act, if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, —

Secrete or conceal any property belonging to his estate;

Or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same, or any part thereof, out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same;

Or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent;

Or spend any part thereof in gaming;

Or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee, or omit from his schedule, any property or effects whatsoever;

Or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof;

Or shall attempt to account for any of his property by fictitious losses or expenses;

Or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud;

Or shall with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for;

He shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.

§ 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other officer of the several courts of bankruptcy

shall, for anything done or pretended to be done under this Act, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof, shall forfeit and pay the sum of not less than three hundred dollars, and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

§ 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document;

Or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

#### FEES AND COSTS.

§ 47. *And be it further enacted*, That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this Act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers:

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this Act, one dollar.

For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions, the fees now allowed by law.

For every discharge where there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered the assignee shall pay out of the estate to the messenger the following fees, and no more:

First. — For service of warrant, two dollars.

Second. — For all necessary travel, at the rate of five cents a mile, each way.

Third. — For each written note to creditor named in the schedule, ten cents.

Fourth. — For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they had been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.

(R. S., sec. 5127 *a* (22 June, 1874, ch. 390, sec. 18, 18 Stat. 184). — That from and after the passage of this act, the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections four thousand nine hundred and ninety (ten) and five thousand one hundred and twenty-seven (forty-seven) of said act, and no longer, which duties they shall perform as soon as may be.

§ 5127 *b* (22 June, 1874, ch. 390, sec. 19, 18 Stat. 184). — That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices.

First, the number of cases in bankruptcy in which the warrant prescribed in section five thousand and nineteen (eleven) of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year, from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner every register shall, in the same month, and for the same year, make a report to such clerk; of

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupt;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him, in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

Seventhly, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year, in each class of cases above stated.

And in like manner every assignee shall, during said month make like return to such clerk; of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class respectively and separately;

Fifthly, the total amount of all his fees, charges and emoluments of every kind therein, earned or received.

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees;

Seventhly, the disposition of the cases respectively;

Eighthly, a summarized statement of both classes as aforesaid;

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all classes in bankruptcy pending at the beginning of the said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

Sixthly, the number of assignees' accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and if any have failed to make such report, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees,

charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall in said month of August, transmit every such statement and report so filed with him, together with his own statement and report as aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall on motion made, under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.)

#### OF MEANING OF TERMS AND COMPUTATION OF TIME.

§ 48. *And be it further enacted*, That the word "assignee" and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation."

And in all cases in which any particular number of days is prescribed by this Act, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under this Act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also

§ 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia.

And in and upon the Supreme Courts of the several Territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said Territories.

And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a Circuit Court in bankruptcy may be exercised by the district judge.

§ 50. *And be it further enacted*, That this act shall commence and take effect, as to the appointment of the officers created hereby and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, Anno Domini eighteen hundred and sixty-seven.

## THE BANKRUPTCY ACT OF 1841.

*An Act to establish a uniform System of Bankruptcy throughout the United States.*

(Passed August 19th, 1841, repealed March 3rd, 1843.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, established throughout the United States a uniform system of bankruptcy, as follows: All persons whatsoever, residing in any State, District or Territory of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth to the best of his knowledge and belief a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof, verified by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation, apply to the proper court, as hereinafter mentioned, for the benefit of this act, and therein declare themselves to be unable to meet their debts and engagements, shall be deemed bankrupts within the purview of this act, and may be so declared accordingly by a decree of such court. All persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters or marine insurers, owing debts to the amount of not less than two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly, in the following cases, to wit: whenever such person, being a merchant, or actually using the trade of merchandise, or being a retailer of merchandise, or being a banker, factor, broker, underwriter, or marine insurer, shall depart from the State, District or Territory, of which he is an inhabitant, with intent to defraud his creditors; or shall conceal himself to avoid being arrested, or shall willingly and fraudulently procure himself to be arrested, or his goods and chattels, lands or tenements, to be attached, distrained, sequestered, or taken in execution; or shall remove his goods, chattels and effects, or conceal them to prevent their being levied upon or taken in execution, or by other process; or make any fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidence of debt: Provided, however, That any person so declared a bankrupt, at the instance of a creditor, may, at his election, by petition to such court within ten days after its decree, be entitled to a trial by jury before such court, to ascertain the fact of such bankruptcy; or if such person shall reside at a great distance from the place of holding such court, the said judge, in his discretion, may direct such trial by jury to be had in the county of such person's residence, in such man-



ner and under such directions as the court may prescribe and give; and all such decrees passed by such court, and not so re-examined, shall be deemed final and conclusive as to the subject-matter thereof.

SEC. 2. And be it further enacted, that all future payments, securities, conveyances, or transfers of property, or agreement made or given by any bankrupt in contemplation of bankruptcy, to any person or persons whatever, notitor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona-fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive, the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments shall receive no discharge under the provisions of this act: Provided, That all dealings and transactions by and with any bankrupt, bona-fide made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act: Provided, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignments or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred: And provided also, That nothing in this act contained shall be construed to annul, destroy or impair, any lawful rights of married women, or minors, or any liens, mortgages, or other securities, on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

SEC. 3. And be it further enacted, That all the property, and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as is hereinafter provided, who shall, by a decree of the proper court, be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity

then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death or removal from office, but the same may be prosecuted or defended by his successor in the same office: Provided, however. That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

SEC. 4. And be it further enacted, That every bankrupt who shall bona-fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto: Provided, That in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate. he shall not be entitled to any such discharge or certificate; nor shall any person, being a merchant, banker, factor, underwriter, broker, or marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account, after the passing of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: Provided, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, indorser, surety, or otherwise, for or with the bankrupt. And such bank-

rupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if, in any such examination, he shall wilfully and corruptly answer, or swear, or affirm, falsely, he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if, in any case of bankruptcy, a majority in number and value of the creditors who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge, as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision at any time within ten days thereafter to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if, upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

SEC. 5. And be it further enacted, That all creditors coming and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona-fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid monies as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-

**five dollars:** Provided, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in present; and no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to disallow and set aside any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which such bankrupt lives.

SEC. 6. And be it further enacted, That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed upon the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same

extent the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court in each district, from time to time to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy; which rules, regulations and forms, shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules and regulations and forms substituted therefore; and in all such rules, regulations and forms it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

SEC. 7. And be it further enacted, That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business, at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court, at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where such hearing is thus to be had, and show cause, if any they have, why the prayer of the said petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court shall be under oath, or solemn affirmation, when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by such court, or before any disinterested State judge of the State in which the deposition is taken; and all proof of debts or other claims, by creditors entitled to prove the same under this act shall be under oath or solemn affirmations, as aforesaid, before such court or commissioner appointed thereby, or before some disinterested State judge of the State where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims shall be open to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as the creditor shall have a right to a trial by jury upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely and corruptly answer, swear or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he and they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

SEC. 8. And be it further enacted, That the circuit court within and for the district where the decree of bankruptcy is passed shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferrable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee or by or against any person or persons claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

SEC. 9. And be it further enacted, That all sales, transfers and other conveyances of the assignee of the bankrupt's property and rights of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safe-keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and suable, under the order of such court, for the benefit of the creditors and other persons in interest.

SEC. 10. And be it further enacted, That in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors; and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and in all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount, pro rata, out of the remaining dividends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

SEC. 11. And be it further enacted, That the assignee shall have full authority, by and under the order and direction of the proper court in bank-

ruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable in presenti or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts or other claims, or securities due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.

SEC. 12. And be it further enacted, That if any person who shall have been discharged under this act, shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

SEC. 13. And be it further enacted, That the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept and numbered in the office of the said court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive, as compensation, the sum of twenty-five cents, and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt; but he may be allowed, in addition, his actual travel expenses for that purposes.

SEC. 14. And be it further enacted, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective rights and in-

terests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

SEC. 15. And be it further enacted, That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt, of, in and to, the lands therein mentioned and described, to the purchaser, as fully to all intents and purposes, as if made by such bankrupt himself immediately before such order.

SEC. 16. And be it further enacted, That all jurisdiction, power and authority, conferred upon and vested in the district court of the United States by this act, in cases in bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the Territories of the United States, in cases in bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said Territories.

SEC. 17. And be it further enacted, That this act shall take effect from and after the first day of February next.



## THE BANKRUPTCY ACT OF 1800.

*An Act to establish a uniform System of Bankruptcy throughout the United States.*

(Passed April 4th, 1800; repealed December 19th, 1803.)

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of June next, if any merchant or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter or marine insurer, shall, with intent unlawfully to delay or defraud his or her creditors, depart from the State in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution, or make or cause to be made any fraudulent conveyance of his or her lands, or chattels, or make or admit any false or fraudulent security or evidence of debt, or being arrested for debt, or having surrendered him or herself in discharge of bail, shall remain in prison two months or more, or escape therefrom, or whose lands or effects being attached by process issuing out of, or returnable to, any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, or in districts in which attachments are not dissolved by the entry of special bail, being arrested for debt after his or her lands and effects, or any part thereof, have been attached for a debt or debts amounting to one thousand dollars or upwards, shall not, upon notice of such attachment, give sufficient security for the payment of what may be recovered in the suit in which he or she shall be arrested, at or before the return-day of the same, to be approved by the judge of the district, or some judge of the court out of which the process issued upon which he is arrested, or to which the same shall be returnable, every such person shall be deemed and adjudged a bankrupt: Provided, that no person shall be liable to a commission of bankruptcy if the petition be not preferred, in manner hereinafter directed, within six months after the act of bankruptcy committed.

SEC. 2. And be it further enacted, That the judge of the district court of the United States, for the district where the debtor resides, or usually resided at the time of committing the act of bankruptcy, upon petition in writing against such person or persons being bankrupt, to him to be exhibited by any one creditor; or by a greater number, being partners, whose single debt shall amount to one thousand dollars, or by two creditors whose debts shall amount to one thousand, five hundred dollars, or by more than two creditors whose debts shall amount to two thousand dollars, shall have power, by commission under his hand and seal, to appoint such good and substantial persons, being citizens of the United States, and resident in such district, as such judge shall

deem proper, not exceeding three, to be commissioners of the said bankrupt, and in case of vacancy or refusal to act, to appoint others from time to time as occasion may require: Provided always, that before any commission shall issue, the creditor or creditors petitioning shall make affidavit or solemn affirmation before the said judge of the truth of his, her or their debts, and give bond, to be taken by the said judge, in the name and for the benefit of the said party so charged as a bankrupt, and in such penalty, and with such surety, as he shall require, to be conditioned for the proving of his, her or their debts, as well before the commissioners as upon a trial at law, in case the due issuing forth of the said commission shall be contested, and also for proving the party a bankrupt, and to proceed on such commission in the manner herein prescribed. And if such debt shall not be really due, or after such commission taken out it cannot be proved that the party was a bankrupt, then the said judge shall upon the petition of the party aggrieved, in case there be occasion, deliver such bond to the said party, who may sue thereon, and recover such damages under the penalty of the same, as, upon trial at law, he shall make appear he has sustained, by reason of any breach of the condition thereof.

SEC. 3. And be it further enacted, That before the commissioners shall be capable of acting, they shall respectively take and subscribe the following oath or affirmation, which shall be administered by the judge issuing the commission, or by any of the judges of the Supreme Court of the United States, or any judge, justice or chancellor of any State court, and filed in the office of the clerk of the district court: "I, A. B., do swear, or affirm, that I will faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me, as a commissioner, in a commission of bankruptcy against \_\_\_\_\_, and that without favor or affection, prejudice or malice." And the commissioners, who shall be sworn, as aforesaid, shall proceed, as soon as may be, to execute the same; and upon due examination, and sufficient cause appearing against the party charged, shall and may declare him or her to be a bankrupt: Provided, that before such examination be had, reasonable notice thereof, in writing, shall be delivered to the person charged as a bankrupt; or if he or she be not found at his or her usual place of abode, to some person of the family above the age of twelve years, or if no such person appear, shall be fixed at the front or other public door of the house in which he or she usually resides, and thereupon it shall be in the power of such person, so charged as aforesaid, to demand before, or at the time appointed for such examination, that a jury be empanelled to inquire into the fact or facts alleged as the causes for issuing the commission, and on such demand being made the inquiry shall be had before the judge granting the commission, at such time as he may direct, and in that case such person shall not be declared bankrupt, unless, by the verdict of the jury, he or she shall be found to be within the description of this act, and shall be convicted of some one of the acts described in the first section of this act: Provided also, that any commission which shall be taken out as aforesaid, and which shall not be proceeded in as aforesaid, within thirty days thereafter, may be superseded by the said judge who shall have granted the same, upon the application of the party thereby charged as a bankrupt, or of

any creditor of such person, unless the delay shall have been unavoidable or upon a just occasion.

SEC. 4. And be it further enacted, That the commissioners so to be appointed shall have power forthwith, after they have declared such person a bankrupt, to cause to be apprehended, by warrant under their hands and seals, the body of such bankrupt, wheresoever to be found within the United States: Provided, they shall think that there is reason to apprehend that the said bankrupt intends to abscond or conceal him or herself, and in case it be necessary in order to take the body of said bankrupt, shall have power to cause the doors of the dwelling-house of such bankrupt to be broken, or the doors of any other house in which he or she shall be found.

SEC. 5. And be it further enacted, That it shall be the duty of the commissioners so to be appointed, forthwith, after they have declared such person a bankrupt, and they shall have power to take into their possession all the estate, real and personal, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value, (his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted) and also to take into their possession, and secure, all deeds and books of account, papers and writings belonging to such bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed, in manner hereafter provided.

SEC. 6. And be it further enacted, That the said commissioners shall forthwith, after they have declared such person a bankrupt, cause due and sufficient public notice thereof to be given, and in such notice shall appoint some convenient time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects; at which meeting the said commissioners shall admit the creditors of such bankrupt to prove their debts; and where any creditor shall reside at a distance from the place of such meeting shall allow the debt of such creditor to be proved by oath or affirmation, made before some competent authority, and duly certified, and shall permit any person duly authorized by letter of attorney from such creditor, due proof of the execution of such letter of attorney being first made, to vote in the choice of an assignee or assignees of such bankrupt's estate and effects in the place and stead of such creditor: and the said commissioners shall assign transfer or deliver over, all and singular, the said bankrupt's estate and effects, aforesaid, with all muniments and evidences thereof, to such person or persons as the major part in value of such creditors, according to the several debts then proved, shall choose as aforesaid: Provided always, That in such choice, no vote shall be given by, or in behalf of, any creditor whose debt shall not amount to two hundred dollars.

SEC. 7. Provided always, and be it further enacted, That it shall be lawful for the said commissioners, as often as they shall see cause, for the better preserving and securing of the bankrupt's estate, before assignees shall be chosen as aforesaid, immediately to appoint one or more assignee or assignees of the estate and effects aforesaid, or any part thereof; which assignee or assignees aforesaid, or any of them, may be removed at the meeting of the creditors, so to be appointed as aforesaid for the choice of assignees, is such credit-

ors, entitled to vote as aforesaid, or the major part in value of them, shall think fit; and such assignee or assignees as shall be so removed, shall deliver up all the estate and effects of such bankrupt which shall have come to his or their hands or possession, unto such other assignee or assignees as shall be chosen by the creditors as aforesaid; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners; and if such first assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing, from such new assignee or assignees of their appointment, as aforesaid, to deliver over as aforesaid, all the estate and effects as aforesaid, every such assignee or assignees shall, respectively, forfeit a sum not exceeding five thousand dollars, for the use of the creditors, and shall moreover be liable for the property so detained.

SEC. 8. And be it further enacted, That at any time previous to the closing of the accounts of the said assignee or assignees so chosen as aforesaid, it shall be lawful for such creditors of the bankrupt as are hereby authorized to vote in the choice of assignees, or the major part of them in value, at a regular meeting of the said creditors, to be called for that purpose by the said commissioners, or by one-fourth in value of such creditors, to remove all or any of the assignees chosen as aforesaid, and to choose one or more in his or their place and stead; and such assignee or assignees as shall be so removed shall deliver up all the estate and effects of such bankrupt which shall have come into his or their hands or possession, unto such new assignee or assignees as shall be chosen by the creditors at such meeting; and all such estate and effects shall be, to all intents and purposes, as effectually and legally vested in such new assignee or assignees as if the first assignment had been made to him or them by the said commissioners; and if such former assignee or assignees shall refuse or neglect, for the space of ten days next after notice, in writing from such new assignee or assignees of their appointment, as aforesaid, to deliver over, as aforesaid, all the estate and effects aforesaid, every such former assignee or assignees shall respectively forfeit a sum not exceeding five thousand dollars for the use of the creditors, and moreover shall be liable for the property so detained.

SEC. 9. And be it further enacted, That whenever a new assignee or assignees shall be chosen as aforesaid, no suit at law or in equity shall be thereby abated; but it shall and may be lawful for the court in which any suit may depend, upon the suggestion of the removal of a former assignee or assignees, and of the appointment of a new assignee or assignees, to allow the name of such new assignee or assignees, to be substituted in place of the name or names of the former assignee or assignees, and thereupon the suit shall be prosecuted in the name or names of the new assignee or assignees, in the same manner as if he or they had originally commenced the suit in his or their own names.

SEC. 10. And be it further enacted, That the assignment or assignments of the commissioners of the bankrupt's estate and effects as aforesaid, made as aforesaid, shall be good at law or in equity against the bankrupt, and all persons claiming by, from or under such bankrupt, by any act done at the time.

or after, he shall have committed the act of bankruptcy upon which the commission issued: Provided always, that in case of a bona-fide purchase made before the issuing of the commission from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information or notice of any act of bankruptcy committed, such purchase shall not be invalidated or impeached.

SEC. 11. And be it further enacted, That the said commissioners shall have power, by deed or deeds, under their hands and seals, to assign and convey to the assignee or assignees to be appointed or chosen as aforesaid, any lands, tenements or hereditaments which such bankrupt shall be seized of or entitled to, in fee tail, at law, or in equity, in possession, remainder or reversion, for the benefit of the creditors; and all such deeds being duly executed and recorded, according to the laws of the State within which such lands, tenements or hereditaments may be situated, shall be good and effectual against all persons whom the said bankrupt, by common recovery, or other means, might or could bar of any estate, right, title of or in the said lands, tenements or hereditaments.

SEC. 12. And be it further enacted, That if any bankrupt shall have conveyed or assured any lands, goods or estate, unto any person, upon condition or power of redemption, by payment of money or otherwise, it shall be lawful for the commissioners, or for any person by them duly authorized for that purpose, by writing, under their hands and seals, to make tender of money or other performance according to the nature of such condition, as fully as the bankrupt might have done; and the commissioners, after such performance or tender, shall have power to assign such lands, goods and estate for the benefit of the creditors, as fully and effectually as any other part of the estate of such bankrupt.

SEC. 13. And be it further enacted, That the commissioners aforesaid shall have power to assign, for the use aforesaid, all the debts due to such bankrupt, or to any other person for his or her use or benefit; which assignment shall vest the property and right thereof in the assignee or assignees of such bankrupt, as fully as if the bond, judgment, contract or claim had originally belonged or been made to the said assignees; and after the said assignment, neither the said bankrupt nor any person acting as trustee for him or her, shall have power to recover or discharge the same, nor shall the same be attached as the debt of the said bankrupt; but the assignee or assignees aforesaid shall have such remedy to recover the same, in his or their own name or names, as such bankrupt might or could have had if no commission of bankruptcy had issued. And when any action in the name of such bankrupt shall have been commenced, and shall be pending for the recovery of any debt or effects of such bankrupt, which shall be assigned, or shall or might become vested in the assignee or assignees of such bankrupt as aforesaid, then such assignee or assignees may claim to be, and shall be thereupon, admitted to prosecute such action in his or their name, for the use and benefit of the creditors of such bankrupt; and the same judgment shall be rendered in such action, and all attachments and other security taken therein shall be in like manner holden and liable, as if the said action had been originally commenced in the name of said assignee or assignees, after the original plaintiff therein

had become a bankrupt as aforesaid: Provided, that where a debtor shall have, bona-fide, paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee or assignees.

SEC. 14. And be it further enacted, That if complaint shall be made or information given to the commissioners, or if they shall have good reason to believe or suspect, that any of the property, goods, chattels, or debts, of the bankrupt are in the possession of any other person, or that any person is indebted to or for the use of the bankrupt, then the said commissioners shall have power to summon, or to cause to be summoned, by their attorney or other person duly authorized by them, all such persons before them, or the judge of the district where such person shall reside, by such process, or other means, as they shall think convenient, and upon their appearance to examine them by parole or by interrogatories, in writing, on oath or affirmation, which oath or affirmation they are hereby empowered to administer, respecting the knowledge of all such property, goods, chattels and debts; and if such person shall refuse to be sworn or affirmed, and to make answer to such questions or interrogatories as shall be administered, and to subscribe the said answers, or upon examination shall not declare the whole truth, touching the subject-matter of such examination, then it shall be lawful for the commissioners or judge to commit such person to prison, there to be detained until they shall submit themselves to be examined in manner aforesaid, and they shall, moreover, forfeit double the value of all the property, goods, chattels and debts by them concealed.

SEC. 15. And, be it further enacted, That if any of the aforesaid persons shall, after legal summons to appear before the commissioners or judge, to be examined, refuse to attend, or shall not attend at the time appointed, having no such impediment as shall be allowed of by the commissioners or judge it shall be lawful for the said commissioners or judge to direct their warrants to such person or persons as by them shall be thought proper, to apprehend such persons as shall refuse to appear, and to bring them before the commissioners or judge to be examined, and upon their refusal to come, to commit them to prison, until they shall submit themselves to be examined according to the directions of this act: Provided, that such witnesses as shall be so sent for shall be allowed such compensation as the commissioners or judge shall think fit, to be ratably borne by the creditors; and if any person, other than the bankrupt, either by subornation of others, or by his or her own act, shall wilfully or corruptly commit perjury, shall on conviction thereof be fined not exceeding four thousand dollars and imprisoned not exceeding two years, and moreover shall, in either case, be rendered incapable of being a witness in any court of record.

SEC. 16. And be it further enacted, That if any person or persons shall fraudulently or collusively claim any debts, or claim or detain any real or personal estate of the bankrupt. every such person shall forfeit double the value thereof, to and for the use of the creditors.

SEC. 17. And be it further enacted, That if any person, prior to his or her becoming a bankrupt, shall convey to any of his or her children, or other persons, any lands or goods, or transfer his or her debts or demands into other

persons' names, with intent to defraud his or her creditors, the commissioners shall have power to assign the same in as effectual a manner as if the bankrupt had been actually seized or possessed thereof.

SEC. 18. And be it further enacted, That if any person or persons who shall become bankrupt within the intent and meaning of this act, and against whom a commission of bankruptcy shall be duly issued, upon which commission such person or persons shall be declared bankrupt, shall not, within forty-two days after notice thereof, in writing, to be left at the usual place of abode of such person or persons, or personal notice in case such person or persons be then in prison, and notice given in some gazette, that such commission hath been issued, and of the time and place of meeting of the commissioners, surrender him or herself to the said commissioners, and sign or subscribe such surrender, and submit to be examined, from time to time, upon oath or solemn affirmation, by and before such commissioners, and in all things conform to the provisions of this act, and also upon such his or her examination fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, monies or other effects and estate, and of all books, papers and writings relating thereunto of which he or she was possessed, or in or to which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission, or whereby such bankrupt, or his or her family then hath or may have or expect any profit, possibility of profit, benefit or advantage whatsoever, except only such part of his or her estate and effects as shall have been really and bona-fide before sold and disposed of in the way of his or her trade and dealings, and except such sums of money as shall have been laid out in the ordinary expenses of his or her family, and also upon such examination, execute in due form of law such conveyance, assurance and assignment of his or her estate, whatsoever and wheresoever, as shall be devised and directed by the commissioners, to vest the same in the assignees, their heirs, executors, administrators and assigns forever, in trust, for the use of all and every the creditors of such bankrupt, who shall come in and prove their debts under the commission; and deliver up unto the commissioners all such part of his or her, the said bankrupt's goods, wares, merchandise, money, effects and estate. and all books, papers and writing thereunto relating, as at the time of such examination shall be in his or her possession, custody or power, his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted, then he or she the said bankrupt, upon the conviction of any wilful default or omission in any of the matters or things aforesaid, shall be adjudged a fraudulent bankrupt, and shall suffer imprisonment for a term not less than twelve months, nor exceeding ten years, and shall not at any time after be entitled to the benefits of this act: Provided always, that in case any bankrupt shall be in prison or custody at the time of issuing such commission, and is willing to surrender and submit to be examined according to the directions of this act, and can be brought before the said commissioners

and creditors for that purpose, the expense thereof shall be paid out of the said bankrupt's effects, and in case such bankrupt is in execution, or cannot be brought before the commissioners, that then the said commissioners, or some one of them, shall from time to time attend the said bankrupt in prison or custody, and take his or her discovery as in other cases, and the assignees or one of them, or some person appointed by them, shall attend such bankrupt in prison or custody, and produce his or her books, papers and writings, in order to enable him or her to prepare his or her discovery; a copy whereof the said assignees shall apply for, and the said bankrupt shall deliver to them or their order within a reasonable time after the same shall have been required.

SEC. 19. And be it further enacted, That the said commissioners shall appoint, within the said forty-two days, so limited as aforesaid, for the bankrupt to surrender and conform as aforesaid, not less than three several meetings for the purposes aforesaid, the third of which meetings shall be on the last of the said forty-two days: Provided, always, that the judge of the district within which such commission issues shall have power to enlarge the time so limited as aforesaid, for the purposes aforesaid, as he shall think fit, not exceeding fifty days, to be computed from the end of the said forty-two days, so as such order for enlarging the time be made at least six days before the expiration of said term.

SEC. 20. And be it further enacted, That it shall be lawful for the commissioners, or any other person or officers by them to be appointed, by their warrant, under their hands and seals, to break open in the day time the houses, chambers, shops, warehouses, doors, trunks or chests, of the bankrupt, where any of his or her goods or estate, deeds, books of account or writings, shall be, and to take possession of the goods, money and other estate, deeds, books of account or writings of such bankrupt.

SEC. 21. And be it further enacted, That if the bankrupt shall refuse to be examined, or to answer fully, or to subscribe his or her examination as aforesaid, it shall be lawful for the commissioners to commit the offender to close imprisonment until he or she shall conform him or herself; and if the said bankrupt shall submit to be examined, and upon his or her examination it shall appear that he or she hath committed wilful or corrupt perjury, he or she may be indicted therefor, and being thereof convicted shall suffer imprisonment for a term not less than two years, nor exceeding ten years.

SEC. 22. And be it further enacted, That every bankrupt having surrendered, shall, at all seasonable times before the expiration of the said forty-two days, as aforesaid, or of such further time as shall be allowed to finish his or her examination, be at liberty to inspect his or her books and writings, in the presence of some person to be appointed by the commissioners, and to bring with him or her, for his or her assistance, such persons as he or she shall think fit, not exceeding two at one time, and to make extracts and copies to enable him or her to make a full discovery of his or her effects; and the said bankrupt shall be free from arrests, in coming to surrender, and after having surrendered to the said commissioners for the said forty-two days, or such farther time as shall be allowed for the finishing his or her examination; and in case such bankrupt shall be arrested for debt, or taken on any escape war-



rant or execution, coming to surrender, or after his or her surrender within the time before mentioned, then on producing such summons or notice under the hands of the commissioners, and giving the officer a copy thereof, he or she shall be discharged; and in case any officer shall afterwards detain such bankrupt, such officer shall forfeit to such bankrupt, for his or her own use, ten dollars for every day he shall detain the bankrupt.

SEC. 23. And be it further enacted, That every person who shall knowingly or wilfully receive or keep concealed any bankrupt so as aforesaid summoned to appear, or who shall assist such bankrupt in concealing him or herself, or in absconding, shall suffer such imprisonment, not exceeding twelve months, or pay such fine to the United States, not exceeding one thousand dollars, as upon conviction thereof shall be adjudged.

SEC. 24. And be it further enacted, That the said commissioners shall have power to examine, upon oath or affirmation, the wife of any person lawfully declared a bankrupt, for the discovery of such part of his estate as may be concealed or disposed of by such wife, or by any other person; and the wife shall incur such penalties for not appearing before the said commissioners, or refusing to be sworn or affirmed or examined, and to subscribe her examination, or for not disclosing the truth, as by this act is provided against any other person in like cases.

SEC. 25. And be it further enacted, That in case any person shall be committed by the commissioners for refusing to answer, or for not fully answering any question, or for any other cause, the commissioners shall in their warrant specify such question or other cause of commitment.

SEC. 26. And be it further enacted, That if after the bankrupt shall have finished his or her final examination, any other person or persons shall voluntarily make discovery of any part of such bankrupt's estate, before unknown to the commissioners, such person or persons shall be entitled to five per cent. out of the effects so discovered, and such further reward as the commissioners shall think proper; and any trustee having notice of the bankruptcy, wilfully concealing the estate of any bankrupt for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of the creditors.

SEC. 27. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof such commission may and shall be superseded, and it shall and may be lawful for either of the judges having authority to grant the commission as aforesaid, to award any creditor petitioning another commission. and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission, in manner aforesaid, in trust for, and to be divided among, the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 28. And be it further enacted, That if any bankrupt, after the issuing any commission against him or her, pay to the person who sued out the same, or give or deliver to such person, goods, or any other satisfaction or security, for his or her debt, whereby such person shall privately have and receive a greater proportion of his or her debt than the other creditors, such preference shall be a new act of bankruptcy, and on good proof thereof, such commission shall and may be superseded, and it shall and may be lawful for either of the judges, having authority to grant the commission as aforesaid, to award any creditor petitioning another commission; and such person, so taking such undue satisfaction as aforesaid, shall forfeit and lose, as well his or her whole debts, as the whole he or she shall have taken and received, and shall pay back, or deliver up the same, or the full value thereof, to the assignee or assignees who shall be appointed or chosen under such commission in manner aforesaid, in trust for, and to be divided amongst the other creditors of the said bankrupt, in proportion to their respective debts.

SEC. 29. And be it further enacted, That every person who shall be chosen assignee of the estate and effects of a bankrupt shall, at some time after the expiration of four months, and within twelve months from the time of issuing the commission, cause at least thirty days public notice to be given of the time and place the commissioners and assignees intend to meet, to make a dividend or distribution of the bankrupt's estate and effects; at which time the creditors who have not before proved their debts shall be at liberty to prove the same; and upon every such meeting the assignee or assignees shall produce to the commissioners and creditors then present fair and just accounts of all his or their receipts and payments, touching the bankrupt's estate and effects, and of what shall remain outstanding, and the particulars thereof, and shall, if the creditors then present, or a major part of them, require the same, be examined upon oath or solemn affirmation before the same commissioners, touching the truth of such accounts; and in such accounts the said assignee or assignees shall be allowed and retain all such sum and sums of money as they shall have paid or expended in suing out and prosecuting the commission, and all other just allowances on account of or by reason or means of their being assignee or assignees; and the said commissioners shall order such part of the net produce of the said bankrupt's estate as by such accounts or otherwise shall appear to be in the hands of the said assignees, as they shall think fit, to be forthwith divided among such of the bankrupt's creditors as have duly proved their debts under such commission, in proportion to their several and respective debts; and the commissioners shall make such their order for a dividend in writing, under their hands, and shall cause one part of such order to be filed amongst the proceedings under the said commission, and shall deliver to each of the assignees under such commission a duplicate of such their order, which order of distribution shall contain an account of the time and place of making such order, and the sum total or quantum of all the debts proved under the commission, and the sum total of the money remaining in the hands of the assignee or assignees to be divided, and how many per cent. in particular is there ordered to be paid to every creditor of his debt; and the said assignee or assignees, in pursuance of such order, and without any deed or deeds of distribution to be made for the purpose, shall forthwith

make such dividend and distribution accordingly, and shall take receipts in a book to be kept for the purpose, from each creditor, for the part or share of such dividend or distribution which he or they shall make and pay to each creditor respectively; and such order and receipt shall be a full and effectual discharge to such assignee for so much as he shall fairly pay, pursuant to such order as aforesaid.

SEC. 30. And be it further enacted, That within eighteen months next after the issuing of the commission the assignee or assignees shall make a second dividend of the bankrupt's estate and effects, in case the same were not wholly divided upon the first dividend, and shall cause due public notice to be given of the time and place the said commissioners intend to meet to make a second distribution of the bankrupt's estate and effects, and for the creditors who shall not before have proved their debts to come in and prove the same; and at said meeting the said assignees shall produce, on oath or solemn affirmation as aforesaid, their account of the bankrupt's estate and effects, and what upon the balance thereof shall appear to be in their hands shall, by like order of the commissioners, be forthwith divided amongst such of the bankrupt's creditors as shall have made due proof of their debts, in proportion to their several and respective debts, which second dividend shall be final, unless any suit at law or in equity be pending, or any part of the estate standing out that could not have been disposed of, or that the major part of the creditors shall not have agreed to be sold or disposed of, or unless some other or future estate or effects of the bankrupt shall afterwards come to or vest in the said assignees, in which cases the said assignees shall, as soon as may be, convert such future or other estate and effects into money, and shall within two months after the same be converted into money, by like order of the commissioners, divide the same among such bankrupt's creditors as shall have made due proof of their debt under such commission.

SEC. 31. And be it further enacted, That in the distribution of the bankrupt's effects there shall be paid to every one of the creditors a portion-rate according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or speciality, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (Provided, there be no execution executed upon any of the real or personal estate of such bankrupt before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt. with the other creditors of the bankrupt.

SEC. 32. And be it further enacted, That the assignees shall keep one or more distinct book or books of account, wherein he or they shall duly enter all sums of money or effects which he or they shall have received or got into his or their possession, of the said bankrupt's estate, to which books of account every creditor who shall have proved his or her debt shall, at all reasonable times, have free resort and inspect the same as often as he or she shall think fit.

SEC. 33. And be it further enacted, That every bankrupt, not being in prison or custody, shall at all times after his surrender be bound to attend the assignees upon every reasonable notice, in writing, for that purpose, given or

left at the usual place of his or her abode, in order to assist in making out the accounts of the said bankrupt's estate and effects, and to attend any court of record, to be examined touching the same, or such other business as the said assignee shall judge necessary, for which he shall receive three dollars per day.

SEC. 34. And be it further enacted, That all and every person and persons who shall become bankrupt as aforesaid, and who shall within the time limited by this act surrender him or herself to the commissioners, and in all things conform as in and by this act is directed, shall be allowed five per cent. upon the net produce of all the estate that shall be recovered in and received, which shall be paid unto him or her by the assignee or assignees, in case the net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, creditors of said bankrupt who shall have proved their debts under such commission the amount of fifty per cent. on their said debts, respectively, and so as the said five per cent. shall not exceed, in the whole, the sum of five hundred dollars; and in case the net produce of the said estate shall, over and above the allowance hereafter mentioned, be sufficient to pay the said creditors seventy-five per cent. on the amount of their said debts, respectively, that then the said bankrupt shall be allowed ten per cent. on the amount of such net produce, to be paid as aforesaid so as such ten per cent. shall not, in the whole, exceed the sum of eight hundred dollars; and every such bankrupt shall be discharged from all debts by him or her due or owing at the time he or she became bankrupt, and all which were or might have been proved under the said commission; and in case any such bankrupt shall afterwards be arrested or prosecuted or impleaded, for or on account of any of the said debts, such bankrupt may appear without bail, and may plead the general issue, and give this act and the special matter in evidence. And the certificate of such bankrupt's conforming, and the allowance thereof, according to the directions of this act, shall be, and shall be allowed to be, sufficient evidence, prima facie of the party's being a bankrupt within the meaning of this act, and of the commission and other proceedings precedent to the obtaining such certificate, and a verdict shall thereupon pass for the defendant, unless the plaintiff in such action can prove the said certificate was obtained unfairly and by fraud, or unless he can make appear any concealment of estate or effects by such bankrupt to the value of one hundred dollars. Provided, That no such discharge of a bankrupt shall release or discharge any person who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts from which such bankrupt was discharged as aforesaid.

SEC. 35. Provided always, and be it further enacted, That if the net proceeds of the bankrupt's estate, so to be discovered, recovered and received, shall not amount to so much as will pay all and every of the creditors of the said bankrupt who shall have proved their debts under the said commission, the amount of fifty per cent. on their debts respectively, after all charges first deducted, that then and in such case the bankrupt shall not be allowed five per centum on such estate as shall be recovered in, but shall have and be paid by the assignees so much money as the commissioners shall think fit to allow, not more than three hundred dollars, nor exceeding three per centum on the net proceeds of the said bankrupt's estate.

SEC. 36. Provided also, and be it further enacted, That no person becoming a bankrupt according to the intent and provisions of this act shall be entitled to a certificate of discharge, or to any of the benefits of the act, unless the commissioners shall certify under their hands to the judge of the district within which such commission issues that such bankrupt hath made a full discovery of his or her estate and effects, and in all things conformed him or herself to the directions of this act, and that there doth not appear to them any reason to doubt of the truth of such discovery, or that the same was not a full discovery of the said bankrupt's estate and effects; or unless the said judge should be of opinion that the said certificate was unreasonably denied by the commissioners; and unless two-thirds, in number and in value, of the creditors of the bankrupt, who shall be creditors for not less than fifty dollars respectively, and who shall have duly proved their debts under the said commission, shall sign such certificate to the judge, and testify their consent to the allowance of a certificate of discharge in pursuance of this act; which signing and consent shall be also certified by the commissioners; but the said commissioners shall not certify the same till they have proof by affidavit or affirmation, in writing, of such creditors, or of the persons respectively authorized for that purpose signing the said certificate; which affidavit or affirmation, together with the letter or power of attorney to sign, shall be laid before the judge of the district within which such commission issues, in order for the allowing the certificate of discharge, and the said certificate shall not be allowed unless the bankrupt make oath or affirmation in writing that the certificate of the commissioners and consent of the creditors thereunto were obtained fairly and without fraud; and any of the creditors of the said bankrupt are allowed to be heard, if they shall think fit before the respective persons aforesaid, against the making or allowing of such certificates by the commissioners or judge.

SEC. 37. And be it further enacted, That if any creditor, or pretended creditor, of any bankrupt shall exhibit to the commissioners any fictitious or false debt or demand, with intent to defraud the real creditors of such bankrupt, and the bankrupt shall refuse to make discovery thereof and suffer the fair creditors to be imposed upon, he shall lose all title to the allowance upon the amount of his effects and to a certificate of discharge as aforesaid, nor shall he be entitled to the said allowance or certificate if he has lost at any one time fifty dollars, or in the whole three hundred dollars, after the passing of this act and within twelve months before he became a bankrupt, by any manner of gaming or wagering whatever.

SEC. 38. And be it further enacted, That if any bankrupt who shall have obtained his certificate shall be taken in execution or detained in prison on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on

such bankrupt producing his certificate so as aforesaid allowed, to order any sheriff or gaoler who shall have such bankrupt in custody to discharge such bankrupt without fee or charge, first giving reasonable notice to the plaintiff, or his attorney, of the motion for such discharge.

SEC. 39. And be it further enacted, That every person who shall have bonafide given credit to or taken securities, payable at future days, from persons who are or shall become bankrupts, not due at the time of such persons becoming bankrupt, shall be admitted to prove their debts and contracts as if they were payable presently, and shall have a dividend in proportion to the other creditors, discounting, where no interest is payable, at the rate of so much per centum per annum, as is equal to the lawful interest of the State where the debt was payable, and the obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss to prove the debt thereon, in like manner as if the same had happened before issuing the commission; and the bankrupt shall be discharged from such securities as if such money had been due and payable before the time of his or her becoming bankrupt; and such creditors may petition for a commission, or join in petitioning.

SEC. 40. And be it further enacted, That in case any person committed by the commissioners' warrant shall obtain a habeas corpus, in order to be discharged and there shall appear any insufficiency in the form of the warrant, it shall be lawful for the court or judge before whom such party shall be brought by habeas corpus, by rule or warrant, to commit such persons to the same prison, there to remain until he shall conform as aforesaid, unless it shall be made to appear that he had fully answered all lawful questions put to him by the commissioners; or in case such person was committed for not signing his examination, unless it shall appear that the party had good reason for refusing to sign the same or that the commissioners had exceeded their authority in making such commitment; and in case the gaoler to whom such person shall be committed shall wilfully or negligently suffer such person to escape, or go without the doors or walls of the prison, such gaoler shall for such offense, being convicted thereof, forfeit a sum not exceeding three thousand dollars, for the use of the creditors.

SEC. 41. And be it further enacted, That the gaoler shall, upon the request of any creditor having proved his debt and showing a certificate thereof under the hands of the commissioners, which the commissioners shall give without fee or reward, produce the person so committed; and in case such gaoler shall refuse to show such person to such creditor requesting the same, such person shall be considered as having escaped, and the gaoler or sheriff so refusing shall be liable as for a wilful escape.

SEC. 42. And be it further enacted, That where it shall appear to the said commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other, and what shall appear to be due on either side on the balance of such account after such set off, and no more, shall be claimed or paid on either side respectively.

SEC. 43. And be it further enacted, That it shall and may be lawful to and

for the assignee or assignees of any bankrupt's estate and effects, under the direction of the commissioners, and by and with the consent of the major part in value of such of the said bankrupt's creditors as shall have duly proved their debts under the commission, and shall be present at any meeting of the said creditors, to be held in pursuance of due and public notice for that purpose given, to submit any difference or dispute for, on account of, or by reason or means of, any matter, cause, or thing whatsoever, relating to such bankrupt, or to his or her estate or effects, to the final end and determination of arbitrators to be chosen by the said commissioners, and the major part in value of such creditors as shall be present at such meeting as aforesaid, in such manner as the said assignee or assignees, under the direction and with the consent aforesaid, shall think fit and can agree; and the same shall be binding on the several creditors of the said bankrupt, and the said assignee or assignees are hereby indemnified for what they shall fairly do, according to the directions aforesaid.

SEC. 44. And be it further enacted, That the assignees shall be, and hereby are, vested with full power to dispose of all the bankrupt's estate, real and personal, at public auction or vendue, without being subject to any tax, duty, imposition, or restriction, any law to the contrary notwithstanding.

SEC. 45. And be it further enacted, That if after any commission of bankruptcy sued forth, the bankrupt happen to die before the commissioners shall have distributed the effects, or any part thereof, the commissioners shall nevertheless proceed to execute the commission as fully as they might have done if the party were living.

SEC. 46. And be it further enacted, That where any commission of bankruptcy shall be delivered to the commissioners therein named, to be executed, it shall and may be lawful for them before they take the oath or affirmation of qualification, to demand and take from the creditor or creditors prosecuting such commission a bond with one good security, if required, in the penalty of one thousand dollars, conditioned for the payment of the costs, charges and expenses which shall arise and accrue upon the prosecution of the said commission: Provided always, that the expenses so as aforesaid to be secured and paid by the petitioning creditor or creditors shall be repaid to him or them by the commissioner or assignees out of the first monies arising from the bankrupt's estate or effects, if so much be received therefrom.

SEC. 47. And be it further enacted, That the district judges in each district respectively shall fix a rate of allowance to be made to the commissioners of bankruptcy, as compensation of services to be rendered under the commission, and it shall be lawful for any creditor, by petition to the district judge, to except to any charge contained in the account of the commissioners: and the said judge, after hearing the commissioners, may in a summary way decide upon the validity of such exception.

SEC. 48. And be it further enacted, That all penalties given by this act for the benefit of the creditors shall be recovered by the assignee or assignees by action of debt, and the money so recovered, the charges of suit being deducted, shall be distributed towards payment of the creditors.

SEC. 49. And be it further enacted, That if any action shall be brought against any commissioner, or assignee or other person, having authority under

the commission, for anything done and performed by force of this act, the defendant may plead the general issue, and give this act and the special matter in evidence; and in case of a non-suit, discontinuance, or verdict or judgment for him, he shall recover double costs.

SEC. 50. And be it further enacted, That if any estate, real or personal, shall descend, revert to, or become vested in any person after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate signed by the judge as aforesaid, all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignee or assignees in fee simple or otherwise, in like manner as above directed, with the estate of the said bankrupt, at the time of the bankruptcy, and the proceeds thereof shall be divided among the creditors.

SEC. 51. And be it further enacted, That the said commissioners shall, once in every year, carefully file in the clerk's office of the district court all the proceedings had in every case before them, and which shall have been finished, including the commissions, examinations, dividends, entries and other determinations of the said commissioners, in which office the final certificate of the said bankrupt may also be recorded; all which proceedings shall remain of record in the said office, and certified copies thereof shall be admitted as evidence in all courts, in like manner as the copies of the proceedings of the said district court are admitted in other cases.

SEC. 52. And be it further enacted, That it shall and may be lawful for any creditor of such bankrupt to attend all or any of the examinations of said bankrupt, and the allowance of the final certificate, if he shall think proper, and then and there to propose interrogatories to be put by the judge or commissioners to the said bankrupt and others, and also to produce and examine witnesses and documents before such judge or commissioners, relative to the subject-matter before them. And in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the said judge or commissioners, relative to any material fact in the commencement or progress of the said proceedings, or in the allowance of the certificate aforesaid, it shall and may be lawful for either party to petition the said judge, setting forth such facts and the determination thereon, with the complaint of the party, and a prayer for trial by jury to determine the same, and the said judge shall, in his discretion, make order thereon, and reward a venire facias to the marshal of the district, returnable within fifteen days before him, for the trial of the facts mentioned in the said petition, notice whereof shall be given to the commissioners and creditors concerned in the same; at which time the trial shall be had, unless, on good cause shown, the judge shall give farther time, and judgment being entered on the verdict of the jury shall be final on the said facts, and the judge or commissioners shall proceed agreeably thereto.

SEC. 53. And be it further enacted. That the commissioners before the appointment of assignees, and the assignees after such appointment, may from time to time make such allowance out of the bankrupt's estate until he shall have obtained his final discharge, as in their opinion may be requisite for the necessary support of the said bankrupt and his family.

SEC. 54. And be it further enacted, That it shall be lawful for the major



part in value of the creditors, before they proceed to the choice of assignees, to direct in what manner, with whom and where the monies arising by and to be received from time to time out of the bankrupt's estate shall be lodged, until the same shall be divided among the creditors, as herein provided; to which direction every such assignee and assignees shall conform as often as three hundred dollars shall be received.

SEC. 55. And be it further enacted, That every matter and thing by this act required to be done by the commissioners of any bankrupt shall be valid to all intents and purposes, if performed by a majority of them.

SEC. 56. And be it further enacted, That in all cases where the assignee shall prosecute any debtor of the bankrupt for any debt, duty or demand, the commission, or a certified copy thereof, and the assignment of the commissioners of the bankrupt's estate, shall be conclusive evidence of the issuing the commission and of the person named therein being a trader and bankrupt at the time mentioned therein.

SEC. 57. And be it further enacted, That every person obtaining a discharge from his debts, by certificate as aforesaid, granted under a commission of bankruptcy, shall not on any future commission be entitled to any other certificate than a discharge of his person only; unless the net proceeds of the estate and effects of such person so becoming bankrupt a second time shall be sufficient to pay seventy-five per cent. to his or her creditors on the amount of their debts respectively.

SEC. 58. And be it further enacted, That any creditor of a person against whom a commission of bankruptcy shall have been sued forth, and who shall lay his claim before the commissioners appointed in pursuance of this act, may at the same time declare his unwillingness to submit the same to the judgment of the said commissioners, and his wish that a jury may be impanelled to decide thereon: And in like manner the assignee or assignees of such bankrupt may object to the consideration of any particular claim by the commissioners, and require that the same should be referred to a jury. In either case such objection and request shall be entered on the books of the commissioners, and thereupon an issue shall be made up between the parties, and a jury shall be impanelled, as in other cases, to try the same in the circuit court for the district in which such bankrupt has usually resided. The verdict of such jury shall be subject to the control of the court, as in suits originally instituted in the said court, and when rendered, if not set aside by the said court, shall be certified to the commissioners, and shall ascertain the amount of any such claim, and such creditor or creditors shall be considered in all respects as having proved their debts under the commission.

SEC. 59. And be it further enacted, That the lands and effects of any person becoming bankrupt may be sold on such credit, and on such security, as a major part in value of the creditors may direct: Provided, nothing herein contained shall be allowed so to operate as to retard the granting the bankrupt's certificate.

SEC. 60. And be it further enacted, That if any person becoming bankrupt shall be in prison, it shall be lawful for any creditor or creditors, at whose suit he or she shall be in execution, to discharge him or her from custody, or if such creditor or creditors shall refuse to do so, the prisoner may petition

the commissioners to liberate him or her, and thereupon, if in the opinion of the commissioners the conduct of such bankrupt shall have been fair, so as to entitle him or her in their opinion to a certificate, when by law such certificate might be given, it shall be lawful for them to direct the discharge of such prisoner, and to enter the same in their books, which being notified to the keeper of the gaol in which such prisoner may be confined shall be a sufficient authority for his or her discharge: Provided, that in either case, such discharge shall be no bar to another execution, if a certificate shall be refused to such bankrupt: And provided also, that it shall be no bar to a subsequent imprisonment of such bankrupt by order of the commissioners, in conformity with the provisions of this act.

SEC. 61. And be it further enacted, That this act shall not repeal or annul, or be construed to repeal or annul, the laws of any State now in force, or which may be hereafter enacted, for the relief of insolvent debtors, except so far as the same may respect persons who are or may be clearly within the purview of this act, and whose debts shall amount in the cases specified in the second section thereof to the sums herein mentioned. And if any person within the purview of this act shall be imprisoned for the space of three months, for any debt or upon any contract, unless the creditors of such prisoner shall proceed to prosecute a commission of bankruptcy against him or her, agreeably to the provisions of this act, such debtor may and shall be entitled to relief, under any such laws for the relief of insolvent debtors, this act notwithstanding.

SEC. 62. And be it further enacted, That nothing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States as secured or provided by any law heretofore passed, nor shall be construed to lessen or impair any right to, or security for, money due to the United States or to any of them.

SEC. 63. And be it further enacted, That nothing contained in this act shall be taken or construed to invalidate or impair any lien existing at the date of this act upon the lands or chattels of any person who may have become a bankrupt.

SEC. 64. And be it further enacted, That this act shall continue in force during the term of five years, and from thence to the end of the next session of congress thereafter, and no longer: Provided, that the expiration of this act shall not prevent the complete execution of any commission which may have been previously thereto issued.

*An Act to provide for the more convenient organization of the Courts of the United States.*

(February 13, 1801.)

SEC. 12. The said circuit courts respectively shall have cognizance, concurrently with the district courts, of all cases which shall arise, within their respective circuits, under the act to establish an uniform system of bankruptcy throughout the United States; and each circuit judge, within his respective circuit, shall and may perform, all and singular, the duties enjoined by the said act upon a judge of a district court: and the proceedings under a com-

mission of bankruptcy which shall issue from a circuit judge shall, in all respects, be conformable to the proceedings under a commission of bankruptcy which shall issue from a district judge, mutatis mutandis.

*An Act to amend the judicial system of the United States.*

(April 29, 1802.)

**SEC. 11.** In all cases in which proceedings shall, on the said first day of July next, be pending under a commission of bankruptcy issued in pursuance of the aforesaid act, entitled "An act to provide for the more convenient organization of the courts of the United States," the cognizance of the same shall be, and hereby is, transferred to, and vested in, the district judge of the district within which such commission shall have issued, who is hereby empowered to proceed therein in the same manner and to the same effect as if such commission of bankruptcy had been issued by his order.



GENERAL INDEX.



# GENERAL INDEX.

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